Public Comment

Proposed Amendments

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Proposed Guideline Amendments for Public Comment

United States Sentencing Commission
January 1993

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1. **Synopsis of Proposed Amendment:** *This amendment revises §1B1.3 (Relevant Conduct) to provide that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant's offense level but may, in an exceptional case, provide a basis for an upward departure. (Related amendment proposals: 34 and 35).*

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

* * *

(c) Conduct of which the defendant has been acquitted after trial shall not be considered under this section.

Commentary

Application Notes:

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11. Subsection (c) provides that conduct of which the defendant has been acquitted after trial shall not be considered in determining the offense level under this section. In an exceptional case, however, such conduct may provide a basis for an upward departure.

Insert

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2. **Synopsis of Proposed Amendment:** *This amendment expands policy statement §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing) to address what has become a frequently asked hotline question and troublesome application issue -- the application of amended guidelines to multiple count cases in which the effective date of guideline revision(s) occur between offenses of conviction. The issue has also produced litigation before several appellate courts. See United States v. Castro, 972 F.2d 1107, reh'g denied (Aug. 17, 1992); United States v. Seligsohn, No. 91-2100 (3d Cir. Dec. 9, 1992) (1992 U.S. App. LEXIS 32183). The proposed amendment extends the Commission's "one book" rule to multiple count cases and provides a basic rationale for the policy.*

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition of the Guidelines Manual results in an increased penalty for the first offense.

Commentary

Application Note:

1. *Subsection (b)(2) provides that if an earlier edition of the Guidelines Manual is used, it is to be used in its entirety, except that subsequent clarifying amendments are to be considered.*

Example: A defendant is convicted of an antitrust offense committed in November 1989. He is to be sentenced in December 1992. Effective November 1, 1991, the Commission raised the base offense level for antitrust offenses. Effective November 1, 1992, the Commission lowered the guideline range in the Sentencing Table for cases with an offense level of 8 and criminal history category of I from 2-8 months to 0-6 months. Under the 1992 edition of the Guidelines Manual (effective November 1, 1992), the defendant has a guideline range of 4-10 months (final offense level of 9, criminal history category of I). Under the 1989 edition of the Guidelines Manual (effective November 1, 1989), the defendant has a guideline range of 2-8 months (final offense level of 8, criminal history category of I). If the court determines that application of the 1992 edition of the Guidelines Manual would violate the ex post facto clause of the United States Constitution, it shall apply the 1989 edition of the Guidelines Manual in its entirety. It shall not apply, for example, the offense level of 8 and criminal history category of I from the 1989 edition of the Guidelines Manual in conjunction with the amended guideline range of 0-6 months for this offense level and criminal history category from the 1992 edition of the Guidelines Manual.

Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date generally have held that the ex post facto clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.

Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (e.g., related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the ex post facto clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this

approach. See United States v. Ykema, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed); United States v. Allen, 886 F.2d 143 (8th Cir. 1989); United States v. Cusack, 901 F.2d 29 (4th Cir. 1990). Moreover, this approach should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress' directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction (see §§3D1.1-3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a "cohesive and integrated whole" rather than in a piecemeal fashion). Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it should not be necessary to compare more than two manuals to determine the applicable guideline range - the manual in effect at the time the last offense was completed and the one in effect at the time of sentencing.

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3. **Synopsis of Proposed Amendment:** *This amendment adds a policy statement to Chapter One, Part B (Application Instructions) addressing the determination of the maximum imposable sentence in the case of a juvenile delinquent. The Supreme Court's decision in United States v. R.L.C., 112 S. Ct. 1329 (1992), requires calculation of the guideline range in order to determine the maximum sentence imposable on a juvenile delinquent.*

§1B1.12. Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

(a) The sentencing guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042). However, the sentence imposed upon a juvenile delinquent may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult defendant unless the court finds aggravating factor(s) sufficient to warrant an upward departure from that guideline range. United States v. R.L.C., 112 S. Ct. 1329 (1992). Therefore, it is necessary to determine the guideline range that would be applicable to a similarly situated adult defendant.

§5H1.1. Age (Policy Statement)

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~~The guidelines are not applicable to a person sentenced as a juvenile delinquent under the provisions of 18 U.S.C. § 5037.~~

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4. **Synopsis of Proposed Amendment:** *Section 2A4.2 (Demanding or Receiving Ransom Money) currently provides a single offense level to cover a wide variety of conduct. This amendment revises this guideline to better differentiate the types of conduct covered.*

§2A4.2. Demanding or Receiving Ransom Money for Kidnapped Person

* * *

(b) Specific Offense Characteristic

(1) If the amount of the ransom demanded exceeded $10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(6).

(c) Cross Reference

(1) If the defendant was a participant in the kidnapping offense, apply §2A4.1 (Kidnapping; Abduction; Unlawful Restraint).

(d) Special Instruction

If the offense involved receiving or possessing ransom money, but the defendant was not a participant in the kidnapping or demand for ransom offense (i.e., the defendant's conduct was tantamount to that of an accessory after the fact to the kidnapping or ransom demand offense), do not apply this guideline. Instead, apply §2X3.1 (Accessory After the Fact) in respect to the underlying offense.

* * *

Commentary

Application Note:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted.

Background: ~~This section specifically includes conduct prohibited by 18 U.S.C. § 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom under these circumstances is reflected in §2A4.1. This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. §§ 876-877.~~This section addresses a variety of criminal behavior involving the demand or receipt of ransom for a kidnapped person. If the defendant was a participant in the demand for ransom offense, but was not a participant in the kidnapping offense (e.g., a defendant learns that a kidnapping has occurred and attempts to obtain ransom money by pretending to be the kidnapper), the offense level will be determined under subsection (a) and (b)(1) of this guideline. If the defendant was a participant in the kidnapping offense, the cross reference at subsection (c)(1) will apply. If the offense involved receiving or possessing ransom money, but the defendant was not a participant in the kidnapping or demand for ransom (i.e., where the defendant's conduct was that of an accessory after the fact to the kidnapping or ransom demand offense), subsection (d)(1) provides for the application of §2X3.1 (Accessory after the Fact) in respect to the kidnapping or ransom demand offense, as appropriate.

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5. **Synopsis of Proposed Amendment:** *The Commission is considering amendments to certain fraud, theft, and tax guidelines as they relate to loss and the treatment of the specific offense characteristic for more than minimal planning. The proposed amendment shown below illustrates one method of addressing these issues.*

This amendment eliminates "more than minimal planning" as a specific offense characteristic from §§2B1.1, 2B1.2, and 2F1.1 in order to increase uniformity of application in respect to offenses involving this characteristic. The amendment also modifies the loss tables in §§2B1.1 and 2F1.1 to incorporate gradually an increase for "more than minimal planning" with a two-level increase reached for loss amounts greater

than $40,000. In addition to the phasing-in of the increase for "more than minimal planning, this amendment also modifies the loss tables in §§2B1.1 and 2F1.1 by providing a more uniform rate of increase in the loss increments and by increasing the offense levels for cases that involve extremely high loss amounts, consistent with recent statutory increases in the maximum imprisonment sentences for certain cases sentenced under §§2B1.1 and 2F1.1. This amendment also creates a table in §2F1.2 that starts at a higher amount in order to maintain approximately the same Chapter Two offense levels for guidelines that apply the loss table in §2F1.1 but start with a higher base offense level. Finally, the amendment modifies the tax loss table in §2T4.1 to conform with the changes in the loss tables in §§2B1.1 and 2F1.1 and eliminates the specific offense characteristics in Part T relating to the use of sophisticated means to impede discovery of the nature or extent of the offense, consistent with the elimination of "more than minimal planning" as a specific offense characteristic.

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

(a) Base Offense Level: **4**

(b) Specific Offense Characteristics

~~(1) If the loss exceeded $100, increase the offense level as follows:~~

	~~Loss (Apply the Greatest)~~	~~Increase in Level~~
~~(A)~~	~~$100 or less~~	~~no increase~~
~~(B)~~	~~More than $100~~	~~add 1~~
~~(C)~~	~~More than $1,000~~	~~add 2~~
~~(D)~~	~~More than $2,000~~	~~add 3~~
~~(E)~~	~~More than $5,000~~	~~add 4~~
~~(F)~~	~~More than $10,000~~	~~add 5~~
~~(G)~~	~~More than $20,000~~	~~add 6~~
~~(H)~~	~~More than $40,000~~	~~add 7~~
~~(I)~~	~~More than $70,000~~	~~add 8~~
~~(J)~~	~~More than $120,000~~	~~add 9~~
~~(K)~~	~~More than $200,000~~	~~add 10~~
~~(L)~~	~~More than $350,000~~	~~add 11~~
~~(M)~~	~~More than $500,000~~	~~add 12~~
~~(N)~~	~~More than $800,000~~	~~add 13~~
~~(O)~~	~~More than $1,500,000~~	~~add 14~~
~~(P)~~	~~More than $2,500,000~~	~~add 15~~
~~(Q)~~	~~More than $5,000,000~~	~~add 16~~
~~(R)~~	~~More than $10,000,000~~	~~add 17~~
~~(S)~~	~~More than $20,000,000~~	~~add 18~~
~~(T)~~	~~More than $40,000,000~~	~~add 19~~
~~(U)~~	~~More than $80,000,000~~	~~add 20.~~

(1) If the loss exceeded $600, increase the offense level as follows:

	~~Loss~~ (Apply the Greatest)	**Increase in Level**
(A)	**~~$600 or less~~**	**~~no increase~~**
(B)	**More than $600**	**add 1**
(C)	**More than $1,000**	**add 2**
(D)	**More than $1,700**	**add 3**
(E)	**More than $3,000**	**add 4**
(F)	**More than $5,000**	**add 5**
(G)	**More than $8,000**	**add 6**
(H)	**More than $13,500**	**add 7**

(I)	More than $23,500	add 8
(J)	More than $40,000	add 9
(K)	More than $70,000	add 10
(L)	More than $120,000	add 11
(M)	More than $200,000	add 12
(N)	More than $325,000	add 13
(O)	More than $550,000	add 14
(P)	More than $950,000	add 15
(Q)	More than $1,500,000	add 16
(R)	More than $2,500,000	add 17
(S)	More than $4,500,000	add 18
(T)	More than $8,000,000	add 19
(U)	More than $13,500,000	add 20
(V)	More than $23,500,000	add 21
(W)	More than $40,000,000	add 22
(X)	More than $70,000,000	add 23
(Y)	More than $120,000,000	add 24.]

* * *

~~(5) If the offense involved more than minimal planning, increase by 2 levels.~~

(65) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

(~~7~~6) If the offense --

* * *

Commentary

* * *

Application Notes:

1. ~~"More than minimal planning," "f~~Firearm," and "destructive device" are defined in the Commentary to §1B1.1 (Application Instructions).

* * *

~~*13. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."*~~

* * *

Background: The value of property taken plays an important role in determining sentences for theft offenses, because it is an indicator of both the harm to the victim and the gain to the defendant. ~~Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss from the theft.~~

~~*The guidelines provide an enhancement for more than minimal planning which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.*~~

* * *

§2B1.2. **Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**

* * *

(b) Specific Offense Characteristics

* * *

(4) ~~(A)~~ If the offense was committed by a person in the business of receiving and selling stolen property, increase by **42** levels~~; or~~

~~(B) If the offense involved more than minimal planning, increase by 2 levels.~~

* * *

Commentary

* * *

Application Notes:

1. ~~*"More than minimal planning," "Firearm,"*~~ *and "destructive device" are defined in the Commentary to §1B1.1 (Application Instructions).*

* * *

§2B1.3. **Property Damage or Destruction**

(b) Specific Offense Characteristics

* * *

~~(3) If the offense involved more than minimal planning, increase by 2 levels.~~

* * *

Commentary

* * *

Application Notes:

~~*1. "More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).*~~

[Reamining Notes are to be renumbered.]

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§2B3.3. **Blackmail and Similar Forms of Extortion**

* * *

(b) Specific Offense Characteristic

(1) If the greater of the amount obtained or demanded exceeded ~~$2~~5,000, increase by the corresponding number of levels from the table in ~~§2F1.1~~§2F1.2 (Insider

Trading).

* * *

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

(b) Specific Offense Characteristics

(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded ~~$25~~,000, increase the offense level by the corresponding number of levels from the table in ~~§2F1.1~~§2F1.2 ~~(Insider Trading)~~.

* * *

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

(1) If the face value of the counterfeit items exceeded ~~$25~~,000, increase by the corresponding number of levels from the table at ~~§2F1.1 (Fraud and Deceit)~~§2F1.2 ~~(Insider Trading)~~.

* * *

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

* * *

(b) Specific Offense Characteristics

(1) If the retail value of the motor vehicles or parts involved exceeded $~~25~~,000, increase the offense level by the corresponding number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~§2F1.2 ~~(Insider Trading)~~.

* * *

§2F1.1. Fraud and Deceit

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

~~(1) If the loss exceeded $2,000, increase the offense level as follows:~~

~~Loss (Apply the Greatest)~~	~~Increase in Level~~
~~(A) $2,000 or less~~	~~no increase~~
~~(B) More than $2,000~~	~~add 1~~
~~(C) More than $5,000~~	~~add 2~~
~~(D) More than $10,000~~	~~add 3~~
~~(E) More than $20,000~~	~~add 4~~

~~(F) More than $40,000 add 5~~
~~(G) More than $70,000 add 6~~
~~(H) More than $120,000 add 7~~
~~(I) More than $200,000 add 8~~
~~(J) More than $350,000 add 9~~
~~(K) More than $500,000 add 10~~
~~(L) More than $800,000 add 11~~
~~(M) More than $1,500,000 add 12~~
~~(N) More than $2,500,000 add 13~~
~~(O) More than $5,000,000 add 14~~
~~(P) More than $10,000,000 add 15~~
~~(Q) More than $20,000,000 add 16~~
~~(R) More than $40,000,000 add 17~~
~~(S) More than $80,000,000 add 18.~~

~~(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.~~

(1) If the loss exceeded $1,700, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$1,700 or less	no increase
(B)	More than $1,700	add 1
(C)	More than $3,000	add 2
(D)	More than $5,000	add 3
(E)	More than $8,000	add 4
(F)	More than $13,500	add 5
(G)	More than $23,500	add 6
(H)	More than $40,000	add 7
(I)	More than $70,000	add 8
(J)	More than $120,000	add 9
(K)	More than $200,000	add 10
(L)	More than $325,000	add 11
(M)	More than $550,000	add 12
(N)	More than $950,000	add 13
(O)	More than $1,500,000	add 14
(P)	More than $2,500,000	add 15
(Q)	More than $4,500,000	add 16
(R)	More than $8,000,000	add 17
(S)	More than $13,500,000	add 18
(T)	More than $23,500,000	add 19
(U)	More than $40,000,000	add 20
(V)	More than $70,000,000	add 21
(W)	More than $120,000,000	add 22.]

* * *

Commentary

* * *

Application Notes:

1. *The adjustments in ~~§2F1.1(b)(3)~~§2F1.1(b)(2) are alternative rather than cumulative. If in a*

particular case, however, both of the enumerated factors applied, an upward departure might be warranted.

~~*2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).*~~

~~*3. "Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.*~~

[Notes 4-18 are to be renumbered as 2-16.]

* * *

Background: * * *

~~*Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.*~~

~~*The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.*~~

* * *

§2F1.2. Insider Trading

* * *

(b) Specific Offense Characteristic

~~(1) Increase by the number of levels from the table in §2F1.1 corresponding to the gain resulting from the offense.~~

(1) If the gain exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $5,000 or less	no increase
(B) More than $5,000	add 1
(C) More than $8,000	add 2
(D) More than $13,500	add 3
(E) More than $23,500	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $325,000	add 9

(K) More than $550,000	add 10
(L) More than $950,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $4,500,000	add 14
(P) More than $8,000,000	add 15
(Q) More than $13,500,000	add 16
(R) More than $23,500,000	add 17
(S) More than $40,000,000	add 18
(T) More than $70,000,000	add 19
(U) More than $120,000,000	add 20.

* * *

§2T1.1. **Tax Evasion**

* * *

(b) Specific Offense ~~Characteristics~~Characteristic

* * *

~~(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.~~

* * *

§2T1.2. **Willful Failure To File Return, Supply Information, or Pay Tax**

* * *

(b) Specific Offense ~~Characteristics~~Characteristic

* * *

~~(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.~~

* * *

§2T1.3. **Fraud and False Statements Under Penalty of Perjury**

* * *

(b) Specific Offense ~~Characteristics~~Characteristic

* * *

~~(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.~~

* * *

§2T1.4. **Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud**

* * *

(b) Specific Offense ~~Characteristics~~Characteristic

* * *

~~(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.~~

(32) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

* * *

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

* * *

~~(b) Specific Offense Characteristic~~

~~(1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.~~

(~~a~~b) Cross Reference

* * *

§2T4.1. Tax Table

~~Tax Loss (Apply the Greatest) Offense Level~~

~~(A) $2,000 or less 6~~
~~(B) More than $2,000 7~~
~~(C) More than $5,000 8~~
~~(D) More than $10,000 9~~
~~(E) More than $20,000 10~~
~~(F) More than $40,000 11~~
~~(G) More than $70,000 12~~
~~(H) More than $120,000 13~~
~~(I) More than $200,000 14~~
~~(J) More than $350,000 15~~
~~(K) More than $500,000 16~~
~~(L) More than $800,000 17~~
~~(M) More than $1,500,000 18~~
~~(N) More than $2,500,000 19~~
~~(O) More than $5,000,000 20~~
~~(P) More than $10,000,000 21~~
~~(Q) More than $20,000,000 22~~
~~(R) More than $40,000,000 23~~
~~(S) More than $80,000,000 24.~~

Tax Loss (Apply the Greatest)	Offense Level
(A) $1,700 or less	6
(B) More than $1,700	7
(C) More than $3,000	8

(D)	More than $5,000	9
(E)	More than $8,000	10
(F)	More than $13,500	11
(G)	More than $23,500	12
(H)	More than $40,000	13
(I)	More than $70,000	14
(J)	More than $120,000	15
(K)	More than $200,000	16
(L)	More than $325,000	17
(M)	More than $550,000	18
(N)	More than $950,000	19
(O)	More than $1,500,000	20
(P)	More than $2,500,000	21
(Q)	More than $4,500,000	22
(R)	More than $8,000,000	23
(S)	More than $13,500,000	24
(T)	More than $23,500,000	25
(U)	More than $40,000,000	26
(V)	More than $70,000,000	27
(W)	More than $120,000,000	28

Additional Issues for Comment: The Commission invites comment on whether any of the following amendments should be made in lieu of the proposed amendment illustrated above: Should the Commission amend §§2B1.1, 2B1.2, 2F1.1 (and other guidelines containing an enhancement for more than minimal planning) to: (a) increase the base offense level of each by two levels; (b) delete the specific offense characteristic for more than minimal planning (and, for §2F1.1, the alternative enhancement for a scheme to defraud more than one victim); and (c) adopt a specific offense characteristic that provides that if the offense involved a single, opportunistic act (explained in the commentary as conduct undertaken on the spur of the moment in response to temptation or sudden opportunity), a two-level decrease may be given? Or, in the alternative, should the Commission amend the definition of "more than minimal planning" in §1B1.1(f) to: (a) delete the references to repeated acts; and/or (b) delete the references to concealment; and/or (c) define the planning necessary to establish the enhancement as "extensive or sophisticated planning"; and/or (d) set forth more examples of the application of the definition of "more than minimal planning" in fraud and theft cases?

In addition, the Commission invites comment on the following questions: (A) Do the loss tables in §2B1.1 and/or §2F1.1 and/or §2T4.1 provide appropriate and adequate punishment for the loss categories included; (B) Should the offense levels in the loss table increase at a different rate (e.g., increasing the loss amounts by multiples of 1.5, 1.6, or 1.7, or some other pattern of mathematical increases); (C) Should there be fewer offense level gradations at the lower end of the loss table; and (D) Should there be additional offense level increases at higher loss amounts to provide further distinctions among, and increased punishment for, such offenses?

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6. **Synopsis of Proposed Amendment:** *This amendment expands the Commentary to §2F1.1 (Fraud and Deceit) to provide guidance in cases in which the monetary loss does not adequately reflect the seriousness of the offense. (Related amendment proposals: 7, 37 and 65).*

§2F1.1. Fraud and Deceit

* * *

Commentary

* * *

Application Notes:

* * *

10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

(a) the primary objective of the fraud was non-monetary, or the fraud caused substantial non-monetary harm;

* * *

For example, a departure under this provision might be warranted in the case of a fraudulent blood bank operation that failed to preserve the donors' blood. Such an offense might cause substantial harm to numerous victims that is not adequately taken into account by the total monetary loss, which might be comparatively small.

* * *

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7. **Issue for Comment:** The Commission invites comment on whether the commentary to §2B1.1, §2B1.2, and §2F1.1 should be amended to identify circumstances in which loss does not fully capture the harmfulness and seriousness of the conduct and therefore an upward departure may be warranted (e.g., when some of the harm caused by the offense was nonmonetary; the offense caused particularly significant emotional trauma to, or consciously or recklessly endangered the solvency of, one or more victims; the defendant knowingly or recklessly endangered the health or safety of one or more persons; the offense involved the risk of death; or the offense involved the knowing or reckless risk of serious bodily injury or death to more than one person).

The Commission further invites comment on whether any or all of the circumstances described above (or others bearing on whether loss reflects the seriousness of the offense) should be adopted as specific offense characteristics that provide for one-level or two-level increases instead of an invited upward departure. (Related amendment proposals: 6, 37 and 65).

---

8. **Synopsis of Proposed Amendment:** *This amendment has two parts. First, it provides a ceiling in the drug trafficking guideline (§2D1.1) for defendants who receive a mitigating role adjustment under §3B1.2 (Mitigating Role). Second, the commentary to §3B1.2 is revised to more clearly describe cases in which a mitigating role adjustment is warranted, as well as to differentiate better between different degrees of mitigating role.*

Commentators have argued that the guidelines over-punish certain lower-level defendants when the sentence is driven in large part by the quantity of drugs involved in the offense. For such lower-level defendants, the quantity of drugs involved is often opportunistic and may be a less appropriate measure of the seriousness of the offense than when the defendant has assumed a mid-level or higher role.

The proposed ceiling on drug quantity would limit the impact quantity would play at very high offense levels in determining the sentence of a low-level defendant who receives a mitigating role adjustment. Revisions to the Commentary of §3B1.2 seek to ensure a more clear, concise definition of the defendant who merits a mitigating role reduction and provide greater consistency in application. (Related amendment proposals:

9, 39, 48, and 60).

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(a)(3) the offense specified in the Drug Quantity Table set forth in subsection (c) below. *Provided*, that if the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 32.

§3B1.2. Mitigating Role

* * *

Commentary

Application Notes:

~~*1. Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.*~~

~~*2. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.*~~

~~*3. For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.*~~

~~*4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.*~~

1. This section provides a downward adjustment in offense level for a defendant who has a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 3-level reduction is provided. One factor that determines whether a defendant warrants a mitigating role is the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).

2. *This section does not apply if the defendant possessed a firearm, had ready access to a firearm, or directed or induced another participant to possess a firearm in connection with the criminal activity.*

3. *Subsection (a) (4-level reduction) applies to a defendant who plays a minimal role in the criminal activity. To qualify for a minimal role adjustment under subsection (a), the defendant must be one of the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Application Note 6 below. In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others may be indicative of a minimal role (4-level reduction).*

4. *To qualify for a minor role adjustment under subsection (b) (2-level reduction), the defendant must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.*

5. *The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating role:*

   (a) the defendant performed only unskilled and unsophisticated tasks;

   (b) the defendant had no decision-making authority or responsibility;

   (c) total compensation to the defendant was small in amount, generally in the form of a flat fee; and

   (d) the defendant did not exercise any supervision over other participant(s).

6. *With regard to offenses involving contraband (including controlled substances), a defendant who*

   (a) sold, or played a substantial part in negotiating the terms of the sale of, the contraband;

   (b) had an ownership interest in any portion of the contraband; or

   (c) financed any aspect of the criminal activity

   shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant. For example, a retail-level drug dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating role adjustment. In contrast, a retail-level drug dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

7. *A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule, not an offloader or deckhand),*

   [Option 1 – shall not receive a minimal role (4-level) adjustment for that quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a role adjustment, consideration may be given to a minor role (2-level) adjustment.]

   [Option 2 – shall not receive a minimal role (4-level) adjustment for that quantity of contraband that the defendant transported. Consideration may be given to a minor role (2-level) adjustment.

if the defendant establishes that he transported contraband on a single occasion, that he neither sold nor had an ownership interest in any portion of the contraband, and that he otherwise qualifies for a role adjustment (see e.g., notes 6 and 7).]

***[Option 3** – shall not receive a mitigating role adjustment for that quantity of contraband that the defendant transported.]*

8. *Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In making a determination as to whether the defendant had a mitigating role in the offense, a court may consider a defendant's assertion of facts concerning his role but, as in similar contexts, determinations of credibility are the province of the court.*

Background: ~~This section provides a range of adjustments who plays a part in committing the offense that makes him substantially less culpable than the average participant.~~ The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.

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9. **Synopsis of Proposed Amendment:** *This amendment reduces the upper limit of the Drug Quantity Table from level 42 to level 36 (the upper limit in the original edition of the Guidelines Manual). In addition, this amendment adds specific offense characteristics that further reflect defendant culpability and risk of harm associated with certain offense behavior. As a further measure of distinguishing the seriousness of the offense, a cross reference to Chapter Two, Part A is added where death or bodily injury resulted from the offense conduct. (Related amendment proposals: 8, 39, and 48).*

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

~~(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.~~

(1) (If more than one applies, use the greatest):

(A) If a firearm was discharged or a substantial risk of death or serious bodily injury was otherwise created, increase by 6 levels.

(B) If a dangerous weapon (including a firearm), was otherwise used, increase by 4 levels.

(C) If a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 2 levels.

(2) If the offense involved five or more participants and the defendant was the principal organizer or leader of the criminal activity or was one of several such principal organizers or leaders, increase as follows based on the number of

participants involved in the criminal activity:

Number of Other Participants	Increase in Level
(i) At least 5 but less than 15	add 4
(ii) At least 15 but less than 50	add 6
(iii) 50 or more	add 8.

If this subdivision is applicable, do not apply §3B1.1 (Aggravating Role).

(3) If the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills, decrease by 4 levels.

Provided, however, that this subdivision is not to be applied if an increase has been made under subdivision (b)(1), or the defendant has been convicted of 18 U.S.C. § 924(c).

If this subdivision is applicable, do not apply §3B1.2 (Mitigating Role).

~~(2)~~(4) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
~~(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 130 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.~~	~~Level 42~~
~~(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine (actual),~~	~~Level 40~~

~~or at least 10 KG but less than 30 KG of "Ice";~~
~~At least 1 KG but less than 3 KG of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 40 KG but less than 120 KG of Fentanyl;~~
~~At least 10 KG but less than 30 KG of a Fentanyl Analogue;~~
~~At least 100,000 KG but less than 300,000 KG of Marihuana;~~
~~At least 20,000 KG but less than 60,000 KG of Hashish;~~
~~At least 2,000 KG but less than 6,000 KG of Hashish Oil.~~

~~(3) At least 30 KG but less than 100 KG of Heroin Level 38~~
~~(or the equivalent amount of other Schedule I or II Opiates);~~
~~At least 150 KG but less than 500 KG of Cocaine~~
~~(or the equivalent amount of other Schedule I or II Stimulants);~~
~~At least 1.5 KG but less than 5 KG of Cocaine Base;~~
~~At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);~~
~~At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at least 3 KG but less than 10 KG of "Ice";~~
~~At least 300 G but less than 1 KG of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 12 KG but less than 40 KG of Fentanyl;~~
~~At least 3 KG but less than 10 KG of a Fentanyl Analogue;~~
~~At least 30,000 KG but less than 100,000 KG of Marihuana;~~
~~At least 6,000 KG but less than 20,000 KG of Hashish;~~
~~At least 600 KG but less than 2,000 KG of Hashish Oil.~~

~~(4) At least 10 KG but less than 30 KG of Heroin Level 36~~
~~(or the equivalent amount of other Schedule I or II Opiates);~~
~~At least 50 KG but less than 150 KG of Cocaine~~
~~(or the equivalent amount of other Schedule I or II Stimulants);~~
~~At least 500 G but less than 1.5 KG of Cocaine Base;~~
~~At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);~~
~~At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice";~~
~~At least 100 G but less than 300 G of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 4 KG but less than 12 KG of Fentanyl;~~
~~At least 1 KG but less than 3 KG of a Fentanyl Analogue;~~
~~At least 10,000 KG but less than 30,000 KG of Marihuana;~~
~~At least 2,000 KG but less than 6,000 KG of Hashish;~~
~~At least 200 KG but less than 600 KG of Hashish Oil.~~

(1) 10 KG or more of Heroin **Level 36**
(or the equivalent amount of other Schedule I or II Opiates);
50 KG or more of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
500 G or more of Cocaine Base;
10 KG or more of PCP, or 1 KG or more of PCP (actual);
10 KG or more of Methamphetamine, or
1 KG or more of Methamphetamine (actual), or 1 KG
or more of "Ice";
100 G or more of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

4 KG or more of Fentanyl;
1 KG or more of a Fentanyl Analogue;
10,000 KG or more of Marihuana;
2,000 KG or more of Hashish;
200 KG or more of Hashish Oil.

NOTE: **The remaining subdivisions are renumbered accordingly; the balance of the Drug Quantity Table remains otherwise unchanged.**

(d) Cross Reference

(1) If the offense resulted in death or bodily injury, apply the appropriate guideline from Chapter Two, Part A (Offenses Against the Person), if the resulting offense level is greater than the offense level determined above.

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10. **Synopsis of Proposed Amendment:** *This amendment is intended to resolve the split among the circuits as to the meaning of the term "mixture or substance," as used in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) by expressly providing that this term does not include uningestible, unmarketable portions of a drug mixture. This issue has arisen, subsequent to the United States Supreme Court decision in Chapman v. United States, 111 S. Ct. 1919 (1991), in two types of cases. The first type of case involves a controlled substance bonded to, or suspended in, another substance; however, the controlled substance is not usable until it is separated from the other substance. Examples include cocaine suspended in cream liqueur or cocaine mixed with beeswax. The second type of case involves the waste produced from an illicit laboratory used to manufacture a controlled substance, or chemicals confiscated before the chemical processing of the controlled substance is completed. The waste product is typically water or chemicals used to either remove impurities or form a precipitate (the precipitate, in some cases, being the controlled substance). Typically, a small amount of controlled substance remains in the waste water; often this amount is too small to quantify and is listed as a trace amount (no weight given) in DEA reports. In these types of cases, the waste product is not consumable. The chemicals seized before the end of processing are also not usable in that form because further processing must take place before they can be used. (Related amendment proposal: 49).*

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Commentary

* * *

Application Notes:

1. ***"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841. Mixture or substance does not include uningestible, unmarketable portions of drug mixtures; i.e., materials that have to be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the creme liqueur in a cocaine/creme liqueur mixture, fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance.***

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11. **Synopsis of Proposed Amendment:** *This amendment restructures §2D1.1 so that the scale of the offense is based on the largest amount of controlled substances with which the defendant was associated at any one time (Option 1), or in any thirty-day period (Option 2), except in extremely large scale cases. Other than in extremely large scale cases, the use of such a "snapshot" arguably provides a more reliable method of distinguishing larger from smaller scale drug traffickers.*

§2D1.1 **Unlawful Manufacturing, Importing, Exporting, Trafficking, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

Option 1

* * *

(3) the offense level specifiifed in the Drug Quantity Table set forth in subsection (c) below. Where the offense involved a number of transactions, the offense level is to be limited by the amount of the largest single quantity with which the defendant was involved at any one time. *Provided*, that if any single quantity with which the defendant was involved corresponds to level 32 or greater, the above limitation does not apply and all quantities involved in the offense are to be aggregated.

* * *

Option 2

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below. Where the offense involved a number of transactions over a period of time of more than thirty days, the offense level is to be limited by the amount with which the defendant was involved at any thirty-day period, using the thirty-day period that results in the greatest offense level. *Provided*, that if any single amount with which the defendant was involved corresponds to offense level 32 or greater, the above time limitation does not apply and all quantities involved in the offense are to be aggregated.

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12. **Synopsis of Proposed Amendment:** *This amendment revises the phrase "did not intend to produce and was not reasonably capable of producing" in Application Note 12 of the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) by changing the conjunctive to the disjunctive. The current phraseology has resulted in repeated questions as to its intended meaning.*

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

* * *

Commentary

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In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant ~~did not intend to produce and was not reasonably capable of producingwas not reasonably capable of producing, or otherwise did not intend to produce,~~ the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant ~~did not intend to produce and was not reasonably capable of producingwas not reasonably capable of producing, or otherwise did not intend to produce.~~

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13. **Issue for Comment:** The Commission invites comment on whether §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) should be amended to address the calculation of weight under negotiation in a reverse sting operation (an operation in which government agents sell or negotiate to sell controlled substances to a defendant) when government agents have set a price for the controlled substance that is substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of controlled substance than his available resources would have allowed him to purchase, except for the artificially low price set by the government agents.

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14. **Synopsis of Proposed Amendment:** *This amendment provides that the determination of prior conviction(s) of felony crimes of violence or controlled substance offenses under subsections (a)(1) and (2) of §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and subsections (a)(1), (2), (3), and (4)(A) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) is to be made under the same terms and conditions as such determinations under §4B1.2. The current provision is unclear with respect to the counting of "related" convictions receiving points under §4A1.1(f) and the counting of convictions occurring after the instant offense.*

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

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Commentary

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Application Notes:

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2. *"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," as used in subsections (a)(1) and (a)(2), are defined at §4B1.2 (Definitions of Terms Used in Section 4B1.1), ~~subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1) and (a)(2), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category)~~. Under subsections (a)(1) and (a)(2), the number of prior felony convictions of a crime of violence or*

controlled substance offense is determined under the same terms and conditions as applicable to the counting of such convictions for career offender purposes. See §4B1.2 (Definitions of Terms Used in Section 4B1.1).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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Commentary

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Application Notes:

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5. *"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), ~~subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).~~ Under subsections (a)(1), (a)(2), (a)(3), and (a)(4), the number of prior felony convictions of a crime of violence or controlled substance offense is determined under the same terms and conditions as applicable to the counting of such convictions for career offender purposes. See §4B1.2 (Definitions of Terms Used in Section 4B1.1).*

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15. **Synopsis of Proposed Amendment:** *This amendment conforms the definitions of firearms listed under 26 U.S.C. § 5845(a) that are currently contained in Application Notes to §§ 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and 7B1.1 (Classification of Violations). The amendment also corrects a technical misstatement regarding whether certain unaltered handguns are classified as "other weapons" under 26 U.S.C. § 5845(e).*

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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Commentary

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Application Notes:

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3. *"Firearm listed in 26 U.S.C. § 5845(a)" includes: (i) ~~any short barreled rifle or shotgun or any weapon made therefroma~~ shotgun, or a weapon made from a shotgun, having a barrel or barrels of less than 18 inches in length; a rifle, or a weapon made from a rifle, having a barrel or barrels of less than 16 inches in length; or a weapon made from a shotgun or rifle, having an overall*

length of less than 26 inches; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; ~~or (v) any "other weapon," as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation length rifles or shotgunsand~~ (v) certain other weapons (that are not conventional, unaltered handguns, rifles, or shotguns) as defined in 26 U.S.C. § 5845(e). For a more detailed definition, refer to 26 U.S.C. § 5845.

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§7B1.1. Classification of Violations (Policy Statement)

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Commentary

Application Notes:

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~~4. A "firearm or destructive device of a type described in 26 U.S.C. § 5845(a)" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.~~

4. "Firearm or destructive device of a type described in 26 U.S.C. § 5845(a)" is discussed in Application Notes 3 and 4 of the Commentary to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

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16. **Synopsis of Proposed Amendment:** *Subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) enhances the offense level if the firearm was stolen. Some confusion continues over whether the defendant had to know or have reason to believe the firearm was stolen. The appellate courts uniformly have held that there is no requirement that the defendant had to have known or have reason to believe the firearm was stolen, but questions and litigation regarding the issue continue. This amendment clarifies this issue by expressly stating that the enhancement applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.*

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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Commentary

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Application Notes:

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19. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or

obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

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17. **Issue for Comment:** The Commission solicits comment on whether to clarify the split among the circuits regarding whether the commentary to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) permits or precludes departure on the basis of the type or nature of the firearm (e.g., semiautomatic, military-style assault weapon).

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18. **Issue for Comment:** In §2K2.4 (Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes) paragraphs two and three of Application Note 2 require use of the greater of the sentence prescribed by 18 U.S.C. § 924(c) or the incremental increase in punishment resulting from the relevant firearm enhancement. This proviso has been criticized by some as complicated and confusing. Application Note 2 to §2K2.4 was designed to prevent the anomalous result that occurs when the total punishment for convictions of 18 U.S.C. § 924(c) and the underlying offense for which the firearm was used or possessed is less than the punishment for a conviction of only the underlying offense.

The Commission invites comment on ways in which the commentary may be clarified or simplified, or whether the proviso should be deleted and the issue addressed in the unusual case by departure. Further, comment is invited whether to use an approach that requires the application of the relevant guideline firearm enhancement and apportions the resulting combined sentence between the statutorily mandated sentence and the sentence for the underlying offense.

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19. **Issue for Comment:** The Commission invites comment on whether the offense levels of 6 and 8 for violations of 18 U.S.C. § 922(q) (possession of firearm in school zone) and 18 U.S.C. § 930 (possession of dangerous weapon in federal facility) in §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone) are adequate relative to the offense level 12 provided under §2K2.1(a)(7) for certain nonregulatory firearms offenses, or the offense level 6 provided under §2K2.1(a)(8) for most regulatory firearms offenses. In addition, the Commission invites comment as to whether the offense level provided under §2K2.5 adequately reflects the mandate that any term of imprisonment imposed under 18 U.S.C. § 922(q) run consecutively to any other term of imprisonment.

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20. **Synopsis of Proposed Amendment:** *This amendment revises the guidelines in Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting). When the Commission promulgated §§2S1.1 and 2S1.2 to govern sentencing for the money laundering and monetary transaction offenses found at 18 U.S.C. §§ 1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Additionally, court decisions have since construed the elements of these offenses broadly. This amendment consolidates §§2S1.1 and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct.*

The amendment accomplishes the latter goal chiefly by tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds. If the defendant committed the underlying offense and the offense level can be determined, subsection (a)(1) sets the base offense level equal to that

for the underlying offense. In other instances, the base offense level is keyed to the value of funds involved. The amendment uses specific offense characteristics to assure greater punishment when the defendant knew or believed that the transactions were designed to conceal the criminal nature of the proceeds or when the funds were to be used to promote further criminal activity. A further increase is provided under subsection (b)(2) if sophisticated efforts at concealment were involved.

The amendment also consolidates existing §§2S1.3 and 2S1.4 for ease of application and modifies these guidelines to assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness. Specifically, the proposed amendment links base offense levels for the reporting violations covered by these guidelines to the defendant's state of mind with respect to the source of the funds, and, in instances where the defendant knew, believed or acted with reckless disregard of the fact that the funds were the proceeds of unlawful activity, to the value of the funds involved. (Related amendment proposal: 58).

[§§2S1.1, 2S1.2, 2S1.3, and 2S1.4 are deleted in their entirety]

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the greatest):

(1) the offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense and the offense level for that offense can be determined; or

(2) 12 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances; or

(3) 8 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the transactions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) that the funds were to be used to promote further criminal activity, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense involved (A) placement of funds into, or movement of funds through or from a company or financial institution outside the United States, or (B) otherwise involved the use of a sophisticated form of money laundering, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957.

Application Notes:

1. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

2. *Subsection (b)(1)(A) is designed to provide a two-level increase for those cases that involve actual money laundering, i.e., efforts to make criminally derived funds appear to have a legitimate source. This subsection will apply, for example, when the defendant conducts a transaction through a straw party or a front company, conceals a money-laundering transaction in a legitimate business, engages in a series of transactions with no legitimate business purpose, or uses an alias or otherwise provides false information to disguise the true source or ownership of the funds.*

3. *In order for subsection (b)(1)(B) to apply, the defendant must have intended that the funds would be used to promote further criminal activity, i.e., criminal activity beyond the underlying offense from which the funds were derived.*

4. *Subsection (b)(2) is designed to provide an additional two-level increase for those money laundering cases that are more difficult to detect because sophisticated steps were taken to conceal the origin of the money. Subsection (b)(2)(B) will apply, for example, if the offense involved the layering of transactions, i.e., the creation of more than one level of transaction that appears legitimate.*

5. *If subsection (b)(1)(A) is applicable, subsection (b)(2) also may be applicable. In such cases, the enhancements are cumulative.*

Background: The statutes covered by this guideline are a part of the Anti-Drug Abuse Act of 1986 and prohibit financial and monetary transactions involving funds that are the proceeds of "specified unlawful activity."

§2S1.2. Structuring Transactions to Evade Reporting Requirements; Failure to Report Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

(a) Base Offense Level (Apply the greatest):

(1) 8 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of unlawful activity; or

(2) 6 plus the number of offense levels from the table in §2F1.1 (Fraud or Deceit) corresponding to the value of the funds, if the defendant acted with reckless disregard as to whether the funds were the proceeds of unlawful activity; or

(3) 6.

(b) Cross Reference

(1) If the offense was committed for the purpose of tax evasion, apply the most applicable guideline from Chapter Two, Part T, Subpart 1 (Income Tax) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324. For additional statutory provisions, see Appendix A.

Background: The offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments.

21. **Synopsis of Proposed Amendment:** *This amendment consolidates §§2T1.1 (Tax Evasion), 2T1.2 (Willful Failure To File Return, Supply Information, or Pay Tax), 2T1.3 (Fraud and False Statements Under Penalty of Perjury), and 2T1.5 (Fraudulent Returns, Statements, or Other Documents), thereby eliminating the confusion that has arisen in some cases regarding which guideline applies. In addition, by adopting a uniform definition of tax loss, this amendment eliminates the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others. Furthermore, this amendment clarifies the circumstances under which the specific offense characteristics of §2T1.9 apply and the relationship between the loss calculation under §2T1.4 and §2T1.9. (Related amendment proposal: 41).*

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

~~(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.~~

~~For purposes of this guideline, the "tax loss" is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the "tax loss" defined in §2T1.3.~~

(a) Base Offense Level (Apply the greater):

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 6, if there is no tax loss.

(b) Specific Offense Characteristics

* * *

(2) If sophisticated means were used to impede discovery of the ~~nature~~existence or extent of the offense, increase by 2 levels.

(c) Special Instructions

(1) Definition of Tax Loss. For the purposes of this guideline --

(A) if the offense involved tax evasion or fraud, the tax loss is the total amount of tax that was the object of the evasion or fraud (i.e., the tax loss that would have resulted had the offense been successfully completed);

(B) if the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and willfully did not pay; and

(C) if the offense involved failure to file tax return(s), the tax loss is the amount of tax that the taxpayer owed and did not pay in respect to such return(s).

(2) Determination of Tax Loss. For the purposes of determining the tax loss under this guideline --

(A) in a case in which a tax return was filed and gross income was underreported, there shall be a rebuttable presumption that the tax loss is equal to 28% of the unreported gross income (34% if the taxpayer is a corporation), plus 100% of any false credits claimed against tax;

(B) in the case of a failure to file a tax return, there shall be a rebuttable

presumption that the tax loss is equal to 20% of the gross income (25% if the taxpayer is a corporation), less any tax withheld or otherwise paid; and

(C) in the case in which a tax return was filed and a deduction was improperly claimed to provide a basis for tax evasion in the future, there shall be a rebuttable presumption that the tax loss is equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation).

* * *

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a willful violation of 26 U.S.C. § 6050I), 7206 (except § 7206(2)), 7207.

Application Notes:

~~*1. False statements in furtherance of the evasion (see §§2T1.3, 2T1.5, and 2T1.8) are considered part of the offense for purposes of this guideline.*~~

~~2.~~ For purposes of the guideline, the tax loss is the amount of tax that the taxpayer evaded or attempted to evade. "Tax loss" is defined in subsection (c)(1). The tax loss does not include interest or penalties. Although the definition of tax loss corresponds to what is commonly called the "criminal deficiency," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

Rebuttable presumptions are set forth in subsection (c)(2) to address situations in which the actual tax loss may not be reasonably ascertainable. Where applicable, the rebuttable presumption is to be used unless the government or defense provides sufficient information for a more accurate assessment of the actual tax loss.

Example 1: A defendant files a tax return reporting income of $40,000 when his income was actually $90,000. Under subsection (c)(2)(A), there is a rebuttable presumption that the tax loss is $14,000 ($90,000 of actual gross income minus $40,000 of reported gross income = $50,000 x 28%). If, however, sufficient information were available to make a more accurate assessment of the actual tax loss, such assessment would be used in place of the amount determined under subsection (c)(2)(A).

Example 2: A defendant files a tax return reporting income of $60,000 when his income was actually $130,000. In addition, the defendant claims $10,000 in false tax credits. Under subsection (c)(2)(A), there is a rebuttable presumption that the tax loss is $29,600 ($130,000 of actual gross income minus $60,000 of reported gross income = $70,000 x 28% = $19,600, plus $10,000 of false tax credits). If, however, sufficient information were available to make a more accurate assessment of the actual tax loss, such assessment would be used in place of the amount determined under subsection (c)(2)(A).

Example 3: A defendant fails to file a tax return for a year in which his salary was $24,000, and $2,600 in income tax was withheld by his employer. Under subsection (c)(2)(B), there is a rebuttable presumption that the tax loss is $2,200 ($24,000 of gross income x 20% = $4,800, minus $2,600 of tax withheld). If, however, sufficient information were available to make a more

accurate assessment of the actual tax loss, such assessment would be used in place of the amount determined under subsection (c)(2)(B).

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the tax loss that would have resulted had the offense been successfully completed.

~~3.~~ *In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.*

~~4. The guideline refers to §2T1.3 to provide an alternative minimum standard for the tax loss, which is based on a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. This alternative standard may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim.~~

~~5.~~ *"Criminal activity" means any conduct constituting a criminal offense under federal, state, or local law.*

~~6.~~ *"Sophisticated means," as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied for example, where the defendant used offshore bank accounts, or transactions through corporate shells.*

~~5.~~ *A "credit claimed against tax" is an item that reduces the amount of tax directly, in contrast to a "deduction" that reduces the amount of taxable income.*

~~6.~~ *"Gross income," for the purposes of this section, has the same meaning as it has in 26 C.F.R. § 1.61.*

~~7.~~ *If the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together.*

Background: This guideline relies most heavily on the amount of tax loss ~~evaded~~ because the chief interest protected by the statute is the collection of taxes. A greater tax loss ~~evasion~~ is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion or tax fraud increases, the sanction necessary to deter also increases.

* * *

~~*Although under pre-guidelines practice some large-scale evaders served as much as five years in prison, the average sentence length for defendants sentenced to a term of imprisonment did not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than $10,000 in taxes was about nine months, while the corresponding figure for those evading over $100,000 in taxes was about sixteen months.*~~ *Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000*

in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally-derived income is included as a factor for deterrence purposes. Criminally-derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2). ~~Estimates from pre-guidelines practice were that, on average, the presence of this factor increased time served by the equivalent of 2 levels.~~

Although tax evasion ~~and tax fraud~~ always involves some planning, unusually sophisticated efforts to conceal the evasion ~~or fraud~~ decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. ~~Analyses of pre-guidelines data for other frauds and property crimes showed that careful planning or sophistication generally resulted in an average increase of at least 2 levels.~~

* * *

[§§2T1.2 and 2T1.3 are deleted in their entirety.]

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the resulting tax loss, if any; or

(2) **6**, otherwise.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in ~~§2T1.3~~§2T1.1, resulting from the defendant's aid, assistance, procurance or advice.

(b) Specific Offense Characteristics

(1) If **(A)** the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, **or (B) the defendant was in the business of preparing or assisting in the preparation of tax returns,** increase by **2** levels.

(2) If sophisticated means were used to impede discovery of the ~~nature~~**existence** or **extent of the offense, increase by 2 levels.**

~~**(3) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.**~~

Commentary

* * *

Application Notes:

1. For the general principles underlying the determination of tax loss, ~~see~~ see Application Note 1 of the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents). In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can

be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."

~~1~~2. *Subsection (b)(1) has two prongs. The first prong applies to persons who derive a substantial portion of their income through the promotion of tax fraud or tax evasion, e.g., through promoting fraudulent tax shelters. The second prong applies to persons who regularly act as tax preparers or advisers for profit; if an enhancement from this prong is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

~~2~~3. *"Sophisticated means," as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.*

~~3. Subsection (b)(3) applies to persons who regularly act as tax preparers or advisers for profit. Do not employ §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if this adjustment applies. Subsection (b)(1) may also apply to such persons.~~

~~4. In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."~~

Background: An increased offense level is specified for tax preparers and advisers and those who make a business of promoting tax fraud because their misconduct poses a greater risk of revenue loss and is more clearly willful. Other considerations are similar to those in ~~§2T1.3~~§2T1.1.

~~**§2T1.5. Fraudulent Returns, Statements, or Other Documents**~~

~~(a) Base Offense Level: 6~~

~~*Commentary*~~

~~*Statutory Provision: 26 U.S.C. § 7207.*~~

~~*Background: The offense is a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§2T1.3), which is a felony involving a false statement under penalty of perjury. The offense level has been set at 6 in order to give the sentencing judge considerable latitude because the conduct could be similar to tax evasion.*~~

* * *

§2T1.9. Conspiracy to Impair, Impede or Defeat Tax

(a) Base Offense Level (Apply the greater):

(1) Offense level determined from §2T1.1 or ~~§2T1.3~~§2T1.4, as applicable; or

(2) **10.**

(b) Specific Offense Characteristics

If more than one applies, use the greater:

(1) If the offense involved the planned or threatened use of violence to impair, impede, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by 4 levels.

(2) If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or ~~impede or impair the Internal Revenue Service in the assessment and~~impair, impede, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by 2 levels. Do not, however, apply this adjustment if an adjustment from §2T1.4(b)(1) is applied.

* * *

Commentary

* * *

Application Notes:

* * *

2. *The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from §2T1.1 or ~~§2T1.3~~§2T1.4 (whichever is applicable to the underlying conduct), if that offense level is greater than 10. Otherwise, the base offense level is 10.*

* * *

4. *Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (e.g., an offense involving a "tax protest" group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters).*

* * *

§3D1.2. Groups of Closely-Related Counts

* * *

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

* * *

§§2T1.1, ~~2T1.2, 2T1.3,~~ 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Additional Issue for Comment: The Commission invites comment on whether, in addition to or as an alternative to the amendments proposed to the tax offense guidelines, the tax table at §2T4.1 should be amended by increasing each offense level by [one] [two] level(s). This amendment would offset the potential impact of Commission amendments to the Sentencing Table and Chapter Five, Part C, effective November 1, 1992, that increased the potential for sentences of probation without confinement conditions for lower-level tax offenders (i.e., offenders in Criminal History Category I with final offense levels of 7 or 8).

22. **Synopsis of Proposed Amendment:** *This amendment clarifies the operation of §2X1.1 (Attempt, Solicitation or Conspiracy (Not Covered by a Specific Offense Guideline)). Several appellate courts have read the title of §2X1.1 to mean that the guideline does not apply when the statute covering the substantive offense also covers an inchoate version of the offense. This interpretation is inconsistent with the overall structure of the guidelines as well as specific commentary in other portions of the Guidelines Manual. In addition, this amendment simplifies the structure of this guideline by merging subsections (b)(1), (2), and (3), and by addressing the offenses currently covered by subsection (b)(3)(B) by including a specific reference to solicitation in the titles of the appropriate offense guideline, as is done in the case of conspiracy and attempt.*

§2X1.1. Attempt, Solicitation, or Conspiracy ~~(Not Covered by a Specific Offense Guideline)~~

* * *

(b) Specific Offense Characteristics

~~(1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.~~

~~(2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.~~

~~(3) (A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.~~

~~(B) If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.~~

(1) Decrease by 3 levels unless (A) the defendant, a co-conspirator, or, in the case of a solicitation, the person solicited to commit the offense, committed all of the acts he believed necessary for the successful completion of the substantive offense; or (B) the circumstances demonstrate that he was about to complete all such acts but for apprehension or interruption by some similar event beyond his control.

* * *

Commentary

Application Notes:

1. ~~Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.~~ "Expressly covered by another offense guideline section," as used in subsection (c), means that the title of the offense guideline section applicable to the substantive offense expressly

covers an attempt, conspiracy, or solicitation. For example, §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) expressly covers attempted murder; §2A1.5 (Conspiracy or Solicitation to Commit Murder) expressly covers conspiracy and solicitation to commit murder. In contrast, §2B3.1 (Robbery) does not expressly cover attempt, conspiracy, or solicitation to commit robbery.

* * *

Offense guidelines that expressly cover solicitations include: §2A1.5 (Conspiracy or Solicitation to Commit Murder); §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery; Solicitation of Bribe); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2C1.5 (Payments to Obtain Public Office; Solicitation of Payment); §2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper; Solicitation of Loan or Gratuity); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan); §2E5.6 (Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations; Solicitation of Prohibited Payment or Loan); §2J1.8 (Bribery of Witness; Solicitation of Bribe); §2J1.9 (Payment to Witness; Solicitation of Payment).

* * *

4. *In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely-related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), ~~(b)(2), or (b)(3)(A)~~, or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of $800,000 but the participants completed (or were about to complete) only the acts necessary to steal $30,000, the offense level is the offense level for the theft of $800,000 minus 3 levels, or the offense level for the theft of $30,000, whichever is greater.*

In the case of multiple counts that are not closely-related counts, whether the 3-level reduction under §2X1.1(b)(1), ~~(b)(2), or (b)(3)(A)~~ applies is determined separately for each count.

Background: In most prosecutions for conspiracies or attempts, the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense. Under such circumstances, a reduction of 3 levels is provided under §2X1.1(b)~~(1) or (2)~~.

* * *

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery; Solicitation of Bribe

* * *

§2C1.5. Payments to Obtain Public Office; Solicitation of Payment

* * *

§2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper; Solicitation of Loan or Gratuity

* * *

§2E5.6. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations; Solicitation of Prohibited Payment or Loan

* * *

§2J1.8. Bribery of Witness; Solicitation of Bribe

* * *

§2J1.9. Payment to Witness; Solicitation of Payment

* * *

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23. **Synopsis of Proposed Amendment:** *Numerous questions have arisen regarding the application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in respect to the intended scope of the abuse of trust prong of this adjustment. This amendment reformulates the definition of an abuse of position of trust to provide a more detailed definition that better distinguishes cases warranting this enhancement. (Related amendment proposal: 46).*

§3B1.3. Abuse of Position of Special Trust or Use of Special Skill

If the defendant abused a position of public or private special trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of special trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of special trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Commentary

Application Notes:

~~*1. The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.*~~

1. "Special trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than an employee whose responsibilities are primarily ministerial in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank president's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller, hotel clerk, or postal clerk because such positions are not characterized by the above-described factors.

* * *

Additional Issue for Comment: The Commission invites comment on whether, as an alternative to modifying §3B1.3, the Commission should amend §2B1.1 and §2B1.2 to add a specific offense characteristic relating to enhancement for abuse of trust in embezzlement cases and provide that the enhancement in §3B1.3 would not apply if the proposed specific offense characteristic was applied. The commentary to §3B1.3 would be amended to delete the example regarding an ordinary bank teller.

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24. **Issue for Comment:** The Commission invites comment with regard to §5K1.1 (Substantial Assistance to Authorities) on the following question: Whether in cases involving first offenders, where no violence was associated with the offense, where the Government does not present a motion for substantial assistance, and where the Court nonetheless deems such a motion appropriate, the Court should be able, on its own motion, to depart from the Guidelines? (Related amendment proposals: 31 and 47).

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25. **Synopsis of Proposed Amendment:** *This amendment adds commentary to the policy statement at §6B1.2 (Standards for Acceptance of Plea Agreements) recommending that the government disclose to the defendant information known to the government that is relevant to application of the guidelines in order to encourage plea negotiations that realistically reflect probable outcomes. (Related amendment proposal: 36).*

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

* * *

Commentary

* * *

*The Commission encourages the government [(**Option 1**) in plea discussions] [(**Option 2**) prior to the Rule 11 colloquy] to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to application of the sentencing guidelines.*

* * *

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26. **Issue for Comment:** The Commission invites comment on the most appropriate guideline for the recently enacted armed carjacking statute (Section 101 of Public Law 102-519).

In addition, the Commission invites comment on whether the offense levels in §§2B1.1, 2B1.2, and 2B1.6 should be raised for offenses involving stolen vehicles to reflect the increase in the maximum imposable sentence from five to ten years' imprisonment under sections 102 and 103 of Public Law 102-519 (Anti Car Theft Act of 1992) and, if so, whether the offense levels should be increased by 2, 4, or 6 levels. (Related amendment proposal: 62).

27. **Synopsis of Proposed Amendment:** *This amendment deletes 27 offense guidelines by consolidating them with other offense guidelines that cover similar offense conduct and have either identical or very similar characteristics. Consolidation of offense guidelines in this manner has a number of practical advantages: (A) it shortens and simplifies the Guidelines Manual; (B) it reduces the likelihood of inconsistency in phraseology and definitions from section to section; (C) it reduces possible confusion and litigation as to which guideline applies to particular conduct (e.g., in many instances it is not clear whether §2B1.1 or §2B1.2 applies, because the defendant whose actual conduct involved theft will be convicted of the federal offense of transporting stolen property across a state line, rather than theft); (D) it reduces the number of conforming amendments required whenever similar sections are amended; and (E) it will aid the development of case law because cases involving similar or identical concepts and definitions can be referenced under one guideline rather than different guidelines.*

The purpose of this amendment is to simplify the operation of the guidelines and not to raise or lower offense levels. The amendment is divided into 21 subdivisions (A-U). Subdivisions A-R should not produce any substantive changes. In the remaining subdivisions, the consolidations will result in substantive changes in isolated cases. In subdivision S, the consolidation of §§2B1.1 and 2B1.2 may result in a substantive change in the isolated case of a defendant who participates in a large scale theft from a financial institution but is convicted of an offense referenced to §2B1.2 (receiving, transporting, possessing, or transmitting stolen property) rather than §2B1.1 (theft). In such an atypical case, the proposed consolidation could result in a substantive change because current §2B1.1 contains enhancements related to large scale thefts from financial institutions, while current §2B1.2 does not. In subdivision T, the consolidation of §§2H1.3 and 2H1.5 will result in the enhancement for use of force or damage to religious real property being applied as a sentencing factor rather than being dependent upon the statute of conviction. In subdivision U, the consolidation of §§2G1.1 and 2G1.2 will result in the specific offense characteristics and cross references of §2G1.2 being added to the current §2G1.1.

Proposed Amendment: (A). Section 2B2.2 is deleted in its entirety.

Section 2B2.1 is amended in the title by inserting "or a Structure Other than a Residence" at the end thereof.

Section 2B2.1(a) is amended by deleting "17" and inserting in lieu thereof "(1) 17, if a residence; or (2) 12, if a structure other than a residence.".

The Commentary to §2B2.1 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by inserting ", 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), see Appendix A (Statutory Index)" immediately following "1153".

(B). Section 2B5.2 is deleted in its entirety.

Section 2F1.1 is amended in the title by inserting "; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States" at the end thereof.

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "471-473, 500, 510," immediately following "289,", and by inserting ", 2314, 2315" immediately following "1344".

(C). Section 2B5.4 is deleted in its entirety.

Section 2B5.3 is amended in the title by inserting "or Trademark" at the end thereof.

The Commentary to §2B5.3 captioned "Statutory Provisions" is amended by deleting "2319" and inserting

in lieu thereof "2318-2320".

The Commentary to §2B5.3 captioned "Background" is amended by inserting "and trademark" immediately following "copyright".

(D). Sections 2D3.3, 2D3.4, and 2D3.5 are deleted in their entirety.

Section 2D3.2 is amended in the title by deleting "Manufacture of Controlled Substances in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy" and inserting in lieu thereof "Regulatory Offenses Involving Controlled Substances; Attempt or Conspiracy".

The Commentary to §2D3.2 captioned "Statutory Provisions" is amended by deleting "842(b), 843(a)(3)" and inserting in lieu thereof "842(a)(2), (a)(9), (a)(10), (b), 843(a)(3), 954, 961".

The Commentary to §2D3.2 captioned "Background" is amended by deleting "This offense is a" and inserting in lieu thereof "These offenses are".

(E). Section 2E1.5 is deleted in its entirety.

Appendix A (Statutory Index) is amended in the line beginning "18 U.S.C. § 1951" by deleting "2E1.5" and inserting in lieu thereof "2B3.1, 2B3.2, 2B3.3, 2C1.1".

(F). Sections 2E3.2 and 2E3.3 are deleted in their entirety.

Section 2E3.1 is amended in the title by deleting "Engaging in a Gambling Business", and by inserting in lieu thereof "Gambling Offenses".

Section 2E3.1(a) is amended by deleting "12" and inserting in lieu thereof:

"(1) 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or

(2) 6, otherwise."

The Commentary to §2E3.1 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by deleting "18 U.S.C. § 1955" and inserting in lieu thereof "15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955. For additional statutory provision(s), see Appendix A (Statutory Index)".

(G). Section 2E5.6 is deleted in its entirety.

Section 2E5.1 is amended in the title by inserting "; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations" at the end thereof.

The Commentary to §2E5.1 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by inserting "; 29 U.S.C. § 186" immediately following "1954".

The Commentary to §2E5.1 captioned "Background" is amended by inserting ", or labor organizations" immediately following "plans".

(H). Sections 2E5.2 and 2E5.4 are deleted in their entirety.

Appendix A (Statutory Index) is amended in the line beginning "18 U.S.C. § 664" by deleting "2E5.2" and inserting in lieu thereof "2B1.1", and in the line beginning "29 U.S.C. § 501(c)" by deleting "2E5.2" and inserting in lieu thereof "2B1.1".

The Commentary to §3B1.3 captioned "Application Notes" is amended by inserting the following additional note:

"3. The following are specific illustrations of the circumstances in which an adjustment for an abuse of a position of trust will apply:

(A) the offense involved theft, or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan; or

(B) the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) and the defendant was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a).".

(I). Section 2E5.5 is deleted in its entirety.

Section 2E5.3 is amended in the title by inserting "; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act" at the end thereof.

The Commentary to §2E5.3 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by inserting ", 29 U.S.C. §§ 439, 461. For additional statutory provision(s), see Appendix A (Statutory Index)." immediately following "1027".

The Commentary to §2E5.3 captioned "Background" is amended by inserting "It also covers failure to maintain proper documents required by the LMRDA or falsification of such documents." immediately following the first sentence.

(J). Section 2J1.8 is deleted in its entirety.

Section 2J1.3 is amended in the title by inserting "; Bribery of Witness" at the end thereof.

Section 2J1.3(b)(2) is amended by deleting "perjury or subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, or witness bribery".

Section 2J1.3(c)(1) is amended by deleting "perjury or subornation of perjury" and inserting in lieu thereof "perjury, subornation of perjury, or witness bribery".

The Commentary to §2J1.3 captioned "Statutory Provisions" is amended by inserting "201 (b)(3)(4)," immediately before "1621".

(K). Section 2K1.2 is deleted in its entirety.

The Commentary to §2K1.1 captioned "Statutory Provisions" is amended by deleting "842(k), 844(b)." and inserting in lieu thereof "842(j), (k), 844(b). For additional statutory provision(s), see Appendix A

(Statutory Index).".

(L). Section 2K1.7 is deleted in its entirety.

Section 2K2.4 is amended in the title by deleting "Firearms or" and inserting "Firearm," in lieu thereof, and by inserting ", or Explosive" immediately following "Ammunition".

Section 2K2.4(a) is amended by inserting "§ 844(h)," immediately before "§ 924(c)".

The Commentary to §2K2.4 captioned "Statutory Provisions" is amended by inserting "844(h)," immediately before "924(c)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 in the first paragraph by deleting "a firearm" and inserting in lieu thereof "an explosive or firearm", and in the second paragraph by deleting "§ 924(c)" wherever it occurs and inserting in lieu thereof in each instance "§ 844(h), § 924(c),".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 by deleting "§ 924(c)" wherever it occurs and inserting in lieu thereof in each instance "§ 844(h), § 924(c),".

The Commentary to §2K2.4 captioned "Background" is amended by deleting "924(c)" and inserting in lieu thereof "844(h), 924(c),", and by inserting "explosive or" immediately following "characteristic for".

(M). Section 2K3.1 is deleted in its entirety.

Section 2Q1.2 is amended in the title by inserting "; Unlawfully Transporting Hazardous Materials in Commerce" at the end thereof.

The Commentary to §2Q1.2 captioned "Statutory Provisions" is amended by inserting "; 49 U.S.C. § 1809(b)" immediately following "1822(b)".

(N). Section 2L2.3 is deleted in its entirety.

Section 2L2.1 is amended in the title by inserting "Trafficking in a United States Passport;" immediately following "Another;".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by inserting "1542, 1544," immediately following "1427,".

(O). Section 2L2.4 is deleted in its entirety.

Section 2L2.2 is amended in the title by inserting "; Fraudulently Acquiring or Improperly Using a United States Passport" at the end thereof.

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by deleting "1546." and inserting in lieu thereof "1543, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index)."

(P). Section 2M2.2 is deleted in its entirety.

Section 2M2.1 is amended in the title by inserting "or Production" immediately following "Destruction".

The Commentary to §2M2.1 captioned "Statutory Provisions" is amended by inserting ", 2154" immediately following "2153".

(Q). Section 2M2.4 is deleted in its entirety.

Section 2M2.3 is amended in the title by inserting "or Production" immediately following "Destruction".

The Commentary to §2M2.3 captioned "Statutory Provisions" is amended by inserting ", 2156" immediately following "2155".

(R). Sections 2M3.6, 2M3.7, and 2M3.8 are deleted in their entirety.

Section 2M3.3 is amended in the title by inserting "Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information" at the end thereof.

The Commentary to §2M3.3 captioned "Statutory Provisions" is amended by inserting "783(b), (c)," immediately before 793(d)", and by inserting ", 798" immediately following "(g)".

The Commentary to §2M3.3 captioned "Background" is amended by inserting the following additional paragraph at the end:

"This section also covers statutes that proscribe the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government, the unauthorized disclosure to a foreign government or a communist organization of classified information by a government employee, and the unauthorized receipt of classified information.".

(S). Section 2B1.2 is deleted in its entirety.

Section 2B1.1 is amended in the title by inserting "; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property" at the end thereof.

Section 2B1.1(b)(2) is amended by inserting "(A)" immediately following "If", and by inserting "or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, or controlled substance" immediately after "taken".

Section 2B1.1(b)(4) is amended by inserting "(A)" immediately following "If", and by inserting ", or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail" immediately following "taken".

Section 2B1.1(b)(5) is amended by inserting "-- (A) involved receiving stolen property and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels; or (B)" immediately following "offense".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "553(a)(1)," immediately following "225,", and by deleting "2312," and inserting in lieu thereof "2312-".

The Commentary to §2B1.1 captioned "Background" is amended by inserting, as an additional paragraph at the end, the text of the background commentary of former §2B1.2.

(T). Section 2H1.5 is deleted in its entirety.

Section 2H1.3 is amended in the title by deleting "Use of Force or Threat of Force to Deny" and inserting in lieu thereof "Deprivation of".

Section 2H1.3 is amended by deleting subsection (a) and inserting in lieu thereof:

"(a) Base Offense Level (Apply the greatest):

(1) 15, if physical injury resulted; or

(2) 10, if the offense was committed by the use or threat of force, or involved damage to religious real property; or

(3) 2 plus the offense level applicable to any underlying offense; or

(4) 6.".

The Commentary to §2H1.3 captioned "Statutory Provisions" is amended by inserting "246," immediately following "245,".

The Commentary to §2H1.3 captioned "Application Notes" is amended in Note 2 by deleting "'Injury'" and inserting in lieu thereof "'Physical injury'"; in Note 3 by deleting "§2H1.3(b)(1)" and inserting in lieu thereof "subsection (b)(1)"; and by deleting Note 4.

The Commentary to §2H1.3 captioned "Background" is amended by deleting the last two sentences.

(U). Section 2G1.2 is deleted in its entirety.

Section 2G1.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional subdivisions:

"(2) If the offense involved the transportation of a person who (A) has not attained the age of twelve years, increase by 6 levels; (B) has attained the age of twelve years but has not attained the age of sixteen years, increase by 4 levels; or (C) has attained the age of sixteen years but has not attained the age of eighteen years, increase by 2 levels.

(3) If subsection (b)(2) applies, and the defendant was a parent, relative, or legal guardian of the minor, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.".

Section 2G1.1(c) is amended by redesignating subsection "(c)" as subsection "(d)", by deleting "Instruction" and inserting in lieu thereof "Instructions" and by inserting the following additional subdivision:

"(2) For the purposes of this guideline, "transportation" includes (A) transporting a person for the purpose of prostitution or prohibited sexual conduct, and (B) persuading, inducing, enticing, or coercing a person to travel for the purpose of prostitution or prohibited sexual conduct.".

Section 2G1.1 is amended by inserting the following additional subsection:

"(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a

Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

(2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse).

(3) If the offense did not involve transportation for the purpose of prostitution, and neither subsection (c)(1) nor (c)(2) is applicable, use the offense guideline applicable to the underlying prohibited sexual conduct. If no offense guideline is applicable to the prohibited sexual conduct, apply §2X5.1 (Other Offenses).".

The Commentary to §2G1.1 captioned "Statutory Provisions" is amended by inserting ", 2423" immediately following "2422".

The Commentary to §2G1.1 captioned "Application Notes" is amended by deleting Note 1 and inserting in lieu thereof:

"1. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.";

and by inserting the following additional notes:

"6. Subsection (b)(4) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

7. If the adjustment in subsection (b)(4) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

8. The cross reference in subsection (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

9. The cross reference at subsection (c)(3) addresses the unusual case in which the offense did not involve transportation for the purpose of prostitution and neither subsection (c)(1) nor (c)(2) is applicable. In such case, the guideline for the underlying prohibited sexual conduct is to be used, e.g., §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). If there is no offense guideline for the underlying prohibited sexual conduct, §2X5.1 (Other Offenses) is to be used.".

In addition, Appendix A (Statutory Index) is amended by conforming all references to guidelines that have been deleted by consolidation in subdivisions (A) through (U) above to the appropriate consolidated guideline section.

Miscellaneous Substantive, Clarifying, Conforming Amendments and Issues for Comment

28(A). Synopsis of Proposed Amendment: *The Background Commentary to §2A1.1 (First Degree Murder)*

indicates that there may be some ambiguity regarding whether a term of years may be imposed under 18 U.S.C. § 1111(b) or whether a sentence of life imprisonment is mandated. The appellate courts that have addressed the issue have held uniformly that the statute requires a mandatory term of life imprisonment. This amendment deletes the commentary relevant to this issue as well as three unnecessary sentences of commentary reciting maximum penalties.

§2A1.1. First Degree Murder

* * *

Commentary

* * *

~~*Background: The maximum penalty authorized by 18 U.S.C. § 1111 for first degree murder is death or life imprisonment. Whether a mandatory minimum term of life imprisonment is applicable to every defendant convicted of first degree murder under 18 U.S.C. § 1111 is a matter of statutory interpretation for the courts. The discussion in Application Note 1, supra, regarding circumstances in which a downward departure may be warranted is relevant in the event the penalty provisions of 18 U.S.C. § 1111 are construed to permit a sentence less than life imprisonment, or in the event the defendant is convicted under a statute that expressly authorizes a sentence of less than life imprisonment (e.g., 18 U.S.C. §§ 2113(e), 2118(e)(2), 21 U.S.C. § 848(e)).*~~

~~*The maximum penalty authorized under 21 U.S.C. § 848(e) is death or life imprisonment. If a term of imprisonment is imposed, the statutorily required minimum term is twenty years.*~~

(B). Synopsis of Proposed Amendment: *This amendment revises §§2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) and 2A2.2 (Aggravated Assault) to clarify that the bodily injury enhancement applies when any victim within the parameters of §1B1.3 (Relevant Conduct), not necessarily the victim established by the offense of conviction, sustains injury from the assault. The current language has resulted in a conflict among the circuits with respect to this issue.*

§2A2.1. Assault With Intent to Commit Murder; Attempted Murder

* * *

(b) Specific Offense Characteristics

(1) (A) If ~~the victim~~ a victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if ~~the victim~~ a victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

* * *

§2A2.2. Aggravated Assault

* * *

(b) Specific Offense Characteristics

* * *

(3) If ~~the victim~~ a victim sustained bodily injury, increase the offense level

according to the seriousness of the injury:

* * *

(C). **Synopsis of Proposed Amendment:** *This amendment conforms §§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), 2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means), each of which contains enhancements for physical injury but not death, to the structure of the kidnapping guideline, which provides a cross reference to §2A1.1 (First Degree Murder) where the victim is murdered in the course of the offense.*

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

* * *

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

§2B3.1. Robbery

* * *

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

(c) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(~~1~~2) * * *

§2E2.1. Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

* * *

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply

(D). **Synopsis of Proposed Amendment:** *This amendment clarifies that subsections (b)(7) and (c)(1) of §2A4.1 (Kidnapping, Abduction, Unlawful Restraint), subsections (b)(3) and (c)(1) of §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), and subsections (b)(5) and (c)(1) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) apply to federal, state, and local offenses. The appellate courts have so held uniformly, but considerable litigation and questions regarding this issue continue.*

§2A4.1. Kidnapping, Abduction, Unlawful Restraint

* * *

Commentary

* * *

Background: * * *

An enhancement is provided when the offense is committed for ransom ~~or to facilitate the commission of another offense. Should the application of this guideline result in a penalty less than the result achieved by applying the guideline for the underlying offense, apply the guideline for the underlying offense (e.g., §2A3.1, Criminal Sexual Abuse)~~(subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

* * *

Commentary

* * *

Application Notes:

* * *

4. "Felony offense," as used in subsection (b)(3), means any offense ~~(federal, state, or local)~~ punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.

* * *

8. Under subsection (c)(1), the offense level for the underlying offense ~~(which may be a federal, state, or local offense)~~ is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

* * *

Application Notes:

* * *

7. *"Felony offense," as used in subsection (b)(5), means any offense ~~(federal, state, or local)~~ punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.*

* * *

14. *Under subsection (c)(1), the offense level for the underlying offense ~~(which may be a federal, state, or local offense)~~ is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).*

* * *

(E). **Synopsis of Proposed Amendment:** *This amendment substitutes the term "offense involved" (standard guideline terminology that includes all relevant conduct) for the term "defendant" (a term with a narrower scope) in subsection (a)(1) of §2A5.2 (Interference with Flight Crew Member or Flight Attendant) and subsections (b)(1) and (2) of subsection 2A6.1 (Threatening Communications).*

§2A5.2. Interference with Flight Crew Member or Flight Attendant

(a) Base Offense Level (Apply the greatest):

(1) 30, if the ~~defendant intentionally endangered~~offense involved intentionally ~~endangering~~ the safety of the aircraft and passengers; or

(2) 18, if the ~~defendant recklessly endangered~~offense involved recklessly ~~endangering~~ the safety of the aircraft and passengers; or

* * *

§2A6.1. Threatening Communications

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the ~~defendant engaged in~~offense involved any conduct evidencing an intent to carry out such threat, increase by 6 levels.

(2) If specific offense characteristic §2A6.1(b)(1) does not apply, and the ~~defendant's conduct~~offense involved a single instance evidencing little or no deliberation, decrease by 4 levels.

* * *

(F). **Issue for Comment:** The Commission solicits comment on whether §2A6.1 (Threatening Communications) should be amended to provide that multiple instances of threatening communications to the same victim on different occasions are separate harms and, therefore, not grouped together under §3D1.2, and, if so, whether any additional revisions to this guideline are required.

(G). **Synopsis of Proposed Amendment:** *This amendment makes the definition of loss in §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and 2F1.1 (Fraud and Deceit) more consistent. Application Note 3 of the Commentary to §2B1.1 and Application Note 8 of the Commentary to §2F1.1 address the same issue using different language. Although the term "reasonably reliable information" is deleted from §2B1.1 (there is no corresponding term in §2F1.1), no substantive change results because the reliability of the information considered in respect to all cases is already addressed in §6A1.3 (Resolution of Disputed Factors).*

In addition, this amendment provides additional guidance for the determination of loss in cases that are referenced to §2B1.1 but have loss characteristics closely resembling offenses referenced to §2F1.1, and provides additional guidance for cases in which simply adding the amounts from a series of transactions does not reflect the amount taken or put at risk.

This amendment also clarifies the operation of §2F1.1(b)(3), which currently can be read to authorize counting conduct that is also addressed by other guideline sections. Consequently, questions arise such as whether a defendant who was on probation at the time of the offense receives an enhancement under this subsection as well as from §4A1.1; or whether a defendant who commits the offense while on release receives an enhancement under this section as well as under §2J1.7. This amendment addresses this issue in a manner consistent with the Commission's general principle on double counting.

In addition, the reference in current Application Note 11 of the Commentary to §2F1.1 is not clear. This amendment clarifies the operation of this provision and conforms the language to the phraseology used elsewhere in the guidelines.

In addition, this amendment clarifies the meaning of the term "infringing items" in §§2B5.3 (Criminal Infringement of Copyright) and 2B5.4 (Criminal Infringement of Trademark). Staff have reported repeated questions on this issue.

Finally, this amendment clarifies the operation of §2B6.1 (Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers). In United States v. Thomas (5th Cir. 9/16/92), a panel of the Fifth Circuit interpreted this phrase to mean that once the retail value of the stolen vehicles or parts exceeded $2,000, the court should apply the fraud table based upon "loss," rather than "retail value." This interpretation is inconsistent with the way this phrase is used throughout the guidelines. For example, §2B5.1 (Counterfeiting) references the table in §2F1.1, but the amount to be used is the face value of the counterfeit currency, not "loss"; §2B5.3 (Criminal Infringement of a Copyright) references the table in §2F1.1, but the amount to be used is the retail value of the infringing items, not "loss."

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

* * *

Commentary

* * *

2. *"Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where*

the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the interest that could have been earned had the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.

Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).

In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle $5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is $5,000 (the amount taken), not $45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.

* * *

~~*3. The loss need not be determined with precision, and may be inferred from any reasonably reliable information available, including the scope of the operation.*~~

3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.

* * *

§2F1.1. Fraud and Deceit

* * *

(b) Specific Offense Characteristics

* * *

(3) **If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.**

* * *

Commentary

* * *

Application Notes:

* * *

5. Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree or process. If it is established that an entity the defendant controlled was a party

to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically-named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).

* * *

7. (b) *Fraudulent Loan Application and Contract Procurement Cases*

* * *

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly overstates or understates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

* * *

10. *In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:*

(a) *the primary objective of the fraud was non-monetary;*
(b) *false statements were made for the purpose of facilitating some other crime;*
(c) *the offense caused physical or psychological harm;*
(d) *the offense endangered national security or military readiness;*
(e) *the offense caused a loss of confidence in an important institution.*

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

11. *Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. ~~The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may find it appropriate to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B of this Chapter.~~ Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §§2L2.1, 2L2.2, 2L2.3, or 2L2.4, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.*

* * *

§2B5.3. Criminal Infringement of Copyright

* * *

Commentary

* * *

Application Note:

1. "Infringing items" means the items that violate the copyright laws (not the legitimate items that are infringed upon).

* * *

§2B5.4. Criminal Infringement of Trademark

* * *

Commentary

* * *

Application Note:

1. "Infringing items" means the items that violate the trademark laws (not the legitimate items that are infringed upon).

* * *

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

* * *

Commentary

* * *

Application Notes:

* * *

2. The "corresponding number of levels from the table in §2F1.1 (Fraud and Deceit)," as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.

(H). **Synopsis of Proposed Amendment:** *Under certain statutes addressing extortion and blackmail, the count of conviction may not be specific enough to distinguish the appropriate guideline under the provisions of §1B1.2 (Applicable Guidelines). This amendment revises §2B3.3 (Blackmail and Similar Forms of Extortion) so that in such cases the appropriate guideline will be selected on the basis of the underlying offense.*

§2B3.3. Blackmail and Similar Forms of Extortion

* * *

(c) Cross References

(1) If the offense involved extortion under color of official right, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).

(2) If the offense involved extortion by force or threat of injury or serious damage, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

* * *

(I). **Synopsis of Proposed Amendment:** *This amendment makes conforming changes pertaining to the interaction of Chapter Two (Offense Conduct) and Chapter Eight (Sentencing of Organizations). The amendment conforms the language of the special instructions in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan), and 2E5.6 (Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations) to the language of subsection (c)(3) of §8C2.4 (Base Fine). In addition, the amendment adds a conforming special fine instruction at §§2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper) and 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions). Further, in §2R1.1, this amendment moves the test for determining an organization's volume of commerce in a bid-rigging case in which the organization submitted one or more complementary bids to subsection (b) where it logically fits. Finally, the amendment extends to individual defendants the same standard for determining the volume of commerce in a bid-rigging case involving complementary bids as is now used for organizational defendants.*

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the reasonably foreseeable consequential damages resulting from the unlawful payment.

* * *

§2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper

* * *

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

* * *

§2C1.7. Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *

(d) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the reasonably foreseeable consequential damages resulting from the unlawful payment.

* * *

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

* * *

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the reasonably foreseeable consequential damages resulting from the unlawful payment.

* * *

§2E5.6. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

* * *

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the reasonably foreseeable consequential damages resulting from the unlawful payment.

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

* * *

(b) Specific Offense Characteristics

* * *

(2) If the volume of commerce attributable to the defendant was more than $400,000, adjust the offense level as follows:

* * *

In a bid-rigging case in which an individual or an organization submitted one or more complementary bids, use as the individual's or the organization's volume of commerce the greater of (A) the volume of commerce done by the individual or the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the individual or the organization submitted a complementary bid in connection with the bid-rigging conspiracy.

* * *

(d) Special Instructions for Fines - Organizations

* * *

~~(3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.~~

* * *

Proposed Amendment and Issue for Comment Published at the Request of the Criminal Law Committee of the Judicial Conference of the United States

29. **Synopsis of Proposed Amendment:** *This amendment to the Introductory Commentary of Chapter Five, Part H (Specific Offender Characteristics) provides that departures may be appropriate when offender characteristics are present to an unusual degree and combined in ways important to the purposes of sentencing.*

Proposed Amendment: The Introductory Commentary to §5H1.1 is amended by inserting the following additional paragraph as the third paragraph:

"Offender characteristics that are not ordinarily relevant to determining whether a sentence should be outside the guidelines may be considered if such factors, alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case.".

30. **Issue for Comment:** The Commission invites comment on whether language in Chapter One, Part A 4(b) (Departures) can be read as overly restrictive of a court's ability to depart and, if so, how this language might be amended.

Proposed Amendment and Issues for Comment Published at the Request of the American Bar Association Sentencing Guidelines Committee

31. **Synopsis of Proposed Amendment:** *This amendment revises §5K1.1 (Substantial Assistance to Authorities) to authorize a court to depart, based upon the defendant's substantial assistance, whether or not the government makes a motion for such a departure (in cases not governed by a mandatory minimum sentencing statute). (Related amendment proposals: 24 and 47).*

Proposed Amendment: Section 5K1.1 is amended by deleting "Upon motion of the government stating that" and inserting in lieu thereof "If".

32. **Issue for Comment:** The Commission invites comment as to whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense and, if so, whether this should be accomplished either by (A) providing an additional ground for departure in Chapter Five, Part K or by (B) increasing the number of offense levels in Zone A in Criminal History Category I.

33. **Issue for Comment:** The Commission invites comment on whether it should increase the availability of the type of sentences provided for in Zones A and B of Chapter Five, Part A (Sentencing Table) to more offense levels within all Criminal History categories.

34. **Issue for Comment:** The Commission invites comment on whether it should amend Section 1B1.3 (Relevant Conduct) so as to restrict the court's consideration of conduct that is relevant to determining the applicable guideline range to (A) conduct that is admitted by the defendant in connection with a plea of guilty or nolo contendere and/or (B) conduct that constitutes the elements of the offense of which the defendant was convicted. (Related amendment proposals: 1 and 35).

Proposed Amendments and Issues for Comment Published at the Request of the Practitioners' Advisory Group

35. **Synopsis of Proposed Amendment:** *This amendment addresses the consideration of conduct of which the defendant has been acquitted after trial under §1B1.3 (Relevant Conduct). (Related amendment proposals: 1 and 34).*

Proposed Amendment: Section 1B1.3 is amended by inserting the following additional subsection:

[Option 1: "(c) Conduct of which the defendant has been acquitted after a court or jury trial shall not be considered under this section.".]

[Option 2: "(c) Conduct of which the defendant has been acquitted after a court or jury trial shall not be considered under this section unless the Government proves by clear and convincing evidence that the defendant has committed the conduct for which he/she has been acquitted.".]

36. **Synopsis of Proposed Amendment:** *This amendment adds commentary to §6B1.2 (Standards for Acceptance of Plea Agreements) to encourage plea negotiations that realistically reflect the probable outcome under the sentencing guidelines. (Related amendment proposal: 25).*

Proposed Amendment: The Commentary to §6B1.2 is amended by inserting the following additional paragraph at the end:

> "The Commission encourages the government prior to the entry of a guilty plea or nolo contendere plea under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the government, that are relevant to the application of the sentencing guidelines.".

37. **Issue for Comment:** The Commission invites comment on whether the commentary to §2B1.1 should be conformed to §2F1.1 by stating that: A) the amount of the loss is the actual or intended loss, whichever is greater; B) loss figures should be reduced to reflect the amount the victim has recovered

prior to discovery of the offense or which the victim expects to recover from any assets originally pledged by the defendant; and C) the loss may in some cases significantly overstate or understate the seriousness of the defendant's conduct. In such cases, a departure from the guidelines may be considered. (Related amendment proposals: 6 and 7).

38. **Issue for Comment:** The Commission invites comment on whether §2B1.1 should contain specific offense characteristics adjusting a defendant's offense level downward because he did not personally profit from the theft (e.g., an accountant who is aware of embezzlement by a company president, but does not personally gain), and whether there should be a cap on the offense level for minor or minimal participants sentenced under §2B1.1.

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to 36 (36 was the maximum offense level in the original sentencing guidelines); provides additional enhancements for weapon usage, principal organizers of large scale organizations, and obtaining substantial resources from engaging in the criminal activity by a defendant with an aggravating role; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities by 2 levels; provides a greater reduction for a significantly minimal participant; and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and the offense involves any of the controlled substances listed below, the base offense level shall not exceed level 32:

(a) Heroin;
(b) Cocaine;
(c) Cocaine Base;
(d) Phencyclidine (PCP);
(e) Lysergic Acid Diethylamide (LSD);
(f) N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
(g) Marihuana;
(h) Methamphetamine.

Provided, that if the offense involves any controlled substance other than those listed in subparagraphs (a) through (g) above, and the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 24. If an offense involves both the above listed controlled substances and other controlled substances, apply the offense level specified in the Drug Quantity Table set forth in subsection (c) below, but the base offense level shall not exceed 32 if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role).".

Section 2D1.1(b) is deleted and the following inserted in lieu thereof:

"(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was actually possessed by the defendant, or the defendant induced or directed another participant to actually possess a dangerous weapon, increase by 2 levels.

(2) If a dangerous weapon (including a firearm) was actually brandished or displayed or fired by the defendant, or the defendant induced or directed another participant to brandish, display, or fire a dangerous weapon, increase by 4 levels.

(3) If a dangerous weapon (including a firearm) was actually used by the defendant and

as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to use a dangerous weapon and someone other than that participant received serious bodily injury, or if the defendant created a substantial risk of death or serious bodily injury, or induced or directed another participant to participate in activity that created a substantial risk of death or serious bodily injury, increase by 6 levels.

(4) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(5) If the defendant was the principal organizer or leader of criminal activity that involved 15 or more participants, increase by 2 levels.

(6) If the defendant engaged in criminal activity from which he obtained substantial income or resources, and the defendant qualifies for an aggravating role adjustment pursuant to §3B1.1 (Aggravating Role), increase by 2 levels.".

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting the following as subdivisions 1-8:

"(1)	At least 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 1.5 KG of Cocaine Base; At least 30 KG of PCP, or at least 3 KG of PCP (actual); At least 30 KG of Methamphetamine, or at least 3 KG of Methamphetamine (actual), or at least 3 KG of "Ice"; At least 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 12 KG of Fentanyl; At least 3 KG of a Fentanyl Analogue; At least 30,000 KG of Marihuana; At least 6,000 KG of Hashish At least 600 KG of Hashish Oil.	Level 36
(2)	At least 10 KG but less than 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 500 G but less than 1.5 KG of Cocaine Base; At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG or more of Methamphetamine (actual), or at least 1 KG but less than 3 KG or more of "Ice";	Level 34

At least 100 G but less than 300 G or more of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 4 KG but less than 12 KG or more
of Fentanyl;
At least 1 KG but less than 3 KG or more of
a Fentanyl Analogue;
At least 10,000 KG but less than 30,000 KG or
more of Marihuana;
At least 2,000 KG but less than 6,000 KG or
more of Hashish;
At least 200 KG but less than 600 KG or more
of Hashish Oil.

(3) At least 3 KG but less than 10 KG of Heroin — Level 32
(or the equivalent amount of other Schedule I
or II Opiates);
At least 15 KG but less than 50 KG of Cocaine
(or the equivalent amount of other Schedule I
or II Stimulants);
At least 150 G but less than 500 G of Cocaine Base;
At least 3 KG but less than 10 KG of PCP, or at
least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine,
or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least
300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;
At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.

(4) At least 1 KG but less than 3 KG of Heroin — Level 30
(or the equivalent amount of other Schedule
I or II Opiates);
At least 5 KG but less than 15 KG of Cocaine
(or the equivalent amount of other Schedule
I or II Stimulants);
At least 50 G but less than 150 G of Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or at
least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of
Methamphetamine, or at least 100 G but less
than 300 G of Methamphetamine (actual), or
at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.

(5) At least 700 G but less than 1 KG of Heroin — Level 28
(or the equivalent amount of other Schedule
I or II Opiates);

	At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 35 G but less than 50 G of Cocaine Base; At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual); At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice"; At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 280 G but less than 400 G of Fentanyl; At least 70 G but less than 100 G of Fentanyl Analogue; At least 700 KG but less than 1,000 KG of Marihuana; At least 140 KG but less than 200 KG of Hashish; At least 14 KG but less than 20 KG of Hashish Oil.	
(6)	At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 20 G but less than 35 G of Cocaine Base; At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice"; At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 160 G but less than 280 G of Fentanyl; At least 40 G but less than 70 G of a Fentanyl Analogue; At least 400 KG but less than 700 KG of Marihuana; At least 80 KG but less than 140 KG of Hashish; At least 8 KG but less than 14 KG of Hashish Oil.	Level 26
(7)	At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 G but less than 20 G of Cocaine Base; At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual); At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice"; At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 40 G but less than 160 G of Fentanyl; At least 10 G but less than 40 G of a Fentanyl Analogue; At least 100 KG but less than 400 KG of Marihuana; At least 20 KG but less than 80 KG of Hashish; At least 2 KG but less than 8 KG of Hashish Oil.	Level 24

(8)	At least 70 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 350 but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 3.5 G but less than 5 G of Cocaine Base; At least 70 G but less than 100 G of PCP, or at least 7 G but less than 10 G of PCP (actual); At least 70 G but less than 100 G of Methamphetamine, or at least 7 G but less than 10 G of Methamphetamine (actual), or at least 7 G but less than 10 G of "Ice"; At least 700 MG but less than 1,000 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 28 G but less than 40 G of Fentanyl; At least 7 G but less than 10 G of a Fentanyl Analogue; At least 70 KG but less than 100 KG of Marihuana; At least 14 KG but less than 20 KG of Hashish; At least 1.4 KG but less than 2 KG of Hashish Oil.".	Level 22

The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

"16. In defining substantial income or resources the Court should refer to the body of definitional law that has developed in interpreting Title 21 U.S.C. § 848(c)(2)(B).".

Section 3B1.2 is deleted in its entirety and the following inserted in lieu thereof:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a significantly minimal participant in any criminal activity, decrease by 6 levels.

(b) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(c) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 5 levels.

In cases falling between (b) and (c), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a significantly minimal role (6-level reduction), a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 5-level reduction is provided, and in cases falling between (b) and (c), a 3-level reduction is provided.

2. To determine whether a defendant warrants a mitigating (significantly minimal, minimal, or minor) role adjustment requires an assessment of the defendant's role and relative culpability

in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (significantly minimal, minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.

3. Subsection (a) (6-level reduction) applies to a defendant who plays a significantly minimal role in concerted activity. To qualify for significantly minimal role under subsection (a), the defendant must be the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Note 6 and must be the least culpable. If more than one defendant equally qualifies as the least culpable, both defendants qualify for this reduction.

4. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant plainly must be one of the least culpable, but not the least culpable, of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (significantly minimal, minimal, or minor) role listed in Note 6.

5. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.

6. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (significantly minimal, minimal, or minor) role:

(a) the defendant performed only unskilled and unsophisticated tasks;
(b) the defendant had no decision-making authority or responsibility;
(c) total compensation to the defendant must be small in relation to the compensation or gain realized by those persons who do not have a mitigating role in the offense and should ordinarily not exceed $5,000 and generally should be paid as a flat fee; and
(d) the defendant did not exercise any supervision over other participant(s).

7. With regard to offenses involving contraband (including controlled substances, a defendant who

(a) sold, or negotiated the terms of the sale of, the contraband;
(b) had an ownership interest in any portion of the contraband;
(c) financed any aspect of the criminal activity; or
(d) transported contraband

shall not receive a mitigating (significantly minimal, minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a significantly minimal, minimal, or minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (significantly minimal, minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (significantly minimal, minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

8. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (significantly minimal, minimal, or minor) role

adjustment. In determining whether a mitigating (significantly minimal, minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.".

40. **Issue for Comment:** The Commission invites comment on whether pursuant to 28 U.S.C. § 944(w) the Commission should ask Congress to modify or eliminate the provisions that distinguish between the punishment for powdered cocaine and cocaine base (crack) at the quantity ratio of 100 to 1. Critics argue that little scientific support for a 100 to 1 ratio exists and emphasize that the racial make-up for crack defendants is predominantly black (92.6%) while powdered cocaine defendants are predominantly non-black (70.3%). Given the maxim that the appearance of fairness is almost as important as fairness itself, these critics indicate that the evidence supports the elimination of the 100 to 1 quantity ratio.

Comment is further invited as to whether a change is appropriate in the quantity-based guidelines system for cocaine base (crack) for offenses involving the distribution or possession of amounts above the 10-year mandatory minimum level (50 grams) and below the 5-year mandatory minimum level (5 grams) in that the legislative history of this section of the 1986 Crime Control Act indicates that the mandatory minimum was designed to target street-level dealers who possess small quantities of cocaine base (crack). Critics argue that a quantity-based sentencing system for all defendants who possess or distribute cocaine base (crack) increases the sentencing range of defendants in a particularly harsh manner beyond those targeted by Congress.

Finally, comment is invited as to whether any guidelines distinction as opposed to mandatory minimum distinction needs to be drawn between cocaine and cocaine base (crack) in light of the fact that the legislative history targets only street dealers and the mandatory minimums successfully provided significantly increased punishment for those targets while the quantity-based guidelines system for cocaine base (crack) increases the range of defendants targeted resulting in particularly harsh sentences for defendants who happen to be black.

Proposed Amendments Published at the Request of the Internal Revenue Service

41. **Synopsis of Proposed Amendment:** *This amendment consolidates current §§2T1.1, 2T1.2, 2T1.3, and 2T1.5 into one offense guideline, increases the minimum base offense levels for offenses currently covered by §§2T1.1 and 2T1.3 from level 6 to level 10, increases the minimum offense level for offenses currently covered by §2T1.2 from level 5 to level 9, adopts a uniform definition of tax loss, and creates a new offense guideline to cover violations of the omnibus clause of 26 U.S.C. § 7212(a). (Related amendment proposal: 21).*

Proposed Amendment: Sections 2T1.1 through and including 2T1.9 are deleted and the following inserted in lieu thereof (Note: unless otherwise provided, the Commentary applicable to each guideline is unchanged):

"§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents.

(a) Base Offense Level:

(1) if the defendant is convicted of tax evasion, 10.

(2) if the defendant is convicted of filing fraudulent or false statements under penalty of perjury, 10;

(3) if the defendant is convicted of failure to file a return, supply information, or pay tax, 9;

(4) if the defendant is convicted of the misdemeanor of filing fraudulent returns, statements, or other documents not required to be signed under penalty of perjury, 6;

(b) Specific Offense Characteristics

(1) If the "tax loss" exceeded $10,000, increase the offense level as follows:

	Tax Loss	Increase in Level
(A)	$10,000 or less	no increase
(B)	More than $10,000	add 1
(C)	More than $20,000	add 2
(D)	More than $40,000	add 4
(E)	More than $70,000	add 5
(F)	More than $120,000	add 6
(G)	More than $200,000	add 7
(H)	More than $350,000	add 8
(I)	More than $500,000	add 9
(J)	More than $800,000	add 10.

For purposes of the guidelines in Part T, Offenses Involving Taxation, "tax loss" shall mean the loss that was the object of the evasion or fraud..

(2) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels.

(3) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a willful violation of 26 U.S.C. § 6050I), 7206 (other than a willful violation of 26 U.S.C. § 6050I and not including § 7206(2)) and 7207.

Application Notes:

1. For purposes of this guideline, the tax loss is the amount of loss that was the object of the evasion or fraud. The amount of loss that would have resulted had the scheme or fraud succeeded is properly considered the amount of loss that was the object of the scheme or fraud. The success or failure of a tax evasion or fraud scheme is irrelevant. In typical circumstances, loss should be calculated as indicated in the following examples:

(i) If the offense involved improperly claiming a deduction or an exemption or causing another to improperly claim a deduction or exemption, the tax loss shall be the amount of the improper deduction or exemption multiplied by the applicable tax rate(s).

(ii) If the offense involved filing a return in which gross income was underreported, the tax loss shall be the amount of income omitted from the return multiplied by the applicable tax rate(s).

(iii) If the offense involved improperly claiming a deduction designed to provide a basis for tax evasion or tax fraud in the future, the tax loss shall be the amount of the deduction multiplied by the applicable tax rate for the tax year for which the return was filed.

(iv) If the offense involved failing to file a tax return, the tax loss shall be gross income minus the applicable amount for personal exemption(s) and the amount of the applicable standard deduction, multiplied by the applicable tax rate(s).

(v) If the offense involved improperly claiming a tax credit (i.e., an item that reduces the amount of tax directly), the tax loss is the amount of the improper tax credit.

(vi) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss shall be the amount of the claimed refund.

2. In calculating tax loss, there shall be a rebuttable presumption that the tax loss is the amount calculated under these provisions. If the defendant provides credible evidence that the actual tax loss in the case was different than the amount calculated under these provisions, the tax loss shall be the actual amount established by the defendant. However, the defendant may not attempt to show that the actual tax loss was less than the amount calculated under these provisions by asserting that the intended loss was less than that which would have resulted had the scheme succeeded.

3. In calculating tax loss, the court should utilize as many of the methods set forth in paragraph 1. as fit the circumstances of the case and as most nearly approximate the greatest harm that would have resulted had the scheme succeeded. Where none of the methods of calculating loss fits the circumstances of the particular case, the court should utilize any method that appears appropriate to most nearly calculate the loss that would have resulted had the scheme succeeded.

Delete application note 4 and renumber existing application note 3 as application note 4.

§2T1.2. Failing to Collect or Truthfully Account for and Pay Over Tax

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the amount of tax not collected or accounted for and paid over exceeds $10,000, increase the offense level as specified in §2T1.1.

(c) Cross Reference

(1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the resulting offense level is greater than determined above.

Statutory Provision: 26 U.S.C. § 7202.

§2T1.3. Offenses Relating to Withholding Statements

(a) Base Offense Level: 4

Statutory Provision: 26 U.S.C. §§ 7204, 7205.

§2T1.4. Aiding, Assisting, Procuring, Counseling or Advising Tax Fraud

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the resulting tax loss as defined in §2T1.1 exceeds $10,000, increase the offense level as specified in §2T1.1.

(2) If the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, increase by 2 levels.

(3) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

(4) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

Statutory Provision: 26 U.S.C. § 7206(2).

§2T1.5. Corrupt Endeavors

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) If the tax loss as defined in §2T1.1 exceeds $10,000, increase the offense level as specified in §2T1.1.

Statutory Provision: 26 U.S.C. § 7212(a) (omnibus clause).

Application Notes:

1. This section applies to the omnibus clause of 26 U.S.C. § 7212(a) concerning corrupt endeavors to obstruct or impede the due administration of the internal revenue laws. It does not apply to offenses under 26 U.S.C. § 7212(a) involving corrupt or forcible interference with an officer or employee of the United States acting in an official capacity. Such offenses will be sentenced under §2A2.2 or §2A2.3.

§2T1.6. Failing to Deposit Collected Taxes in Trust Account as Required After Notice

(a) Base Offense Level: 4

(b) Specific Offense Characteristic

(1) If the amount of tax not deposited exceeds $10,000, increase the offense level as specified in §2T1.1.

Statutory Provision: 26 U.S.C. §§ 7215, 7212(b).

§2T1.7. Conspiracy to Impair, Impede, or Defeat Tax

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the tax loss as defined in §2T1.1 exceeds $10,000, increase the offense level as specified in §2T1.1.

(2) If the offense involved the planned or threatened use of violence, increase by 4 levels.

(3) If the conduct was intended to encourage persons in addition to co-conspirators to violate the internal revenue laws or impede or impair the Internal Revenue Service in the assessment and collection of revenue, increase by 2 levels.

(4) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Statutory Provision: 18 U.S.C. § 371.".

42. **Synopsis of Proposed Amendment:** *Option 1 of this amendment increases the offense level for offenses grouped together under §3D1.2(c) when the count that has the specific offense characteristic requiring such grouping has a lower offense level than the other count. Option 2 adds a 2-level increase in §§2D1.1 and 2S1.1 when the defendant fails to report income exceeding $10,000 in any one year.*

Proposed Amendment: [Option 1 - Section 3D1.3 is amended by inserting the following additional subsection:

"(c) In the case of offense grouped together pursuant to §3D1.2(c), when the count that has a specific offense characteristic has an offense level less than the offense level applicable to the group under this provision, the offense level determined in (a) shall be increased by two levels.".]

[Option 2 - Section 2D1.1(b) is amended by inserting the following additional subdivision:

"(3) If the defendant failed to report income exceeding $10,000 in any year from the unlawful manufacturing, importing, exporting, trafficking, or possession of drugs, increase by 2 levels.".

Section 2S1.1(b) is amended by inserting the following additional subdivision:

"(3) If the defendant failed to report income exceeding $10,000 in any year, increase by two levels.".]

43. **Synopsis of Proposed Amendment:** *This amendment revises the multiple-count grouping rules in §3D1.4 (Determining the Combined Offense Level). Under this amendment, count groups that are nine or more levels less serious than the most serious count group would be assigned one-half unit each. Currently, only count groups that are five to eight levels less serious than the most serious count group receive one-half unit; count groups that are nine or more levels less serious than the most serious count group are disregarded.*

Proposed Amendment: Subsections (b) and (c) of §3D1.4 are deleted and the following inserted in lieu thereof:

"(b) Count as one-half Unit any Group that is 5 or more levels less serious than the Group with the highest offense level.".

Proposed Amendments Published at the Request of the United States Postal Service

44. **Synopsis of Proposed Amendment:** *This amendment increases the offense level for theft of mail by 2 levels in addition to the monetary value of the property stolen. In addition, it provides a minimum offense level of 14 if the offense involved an organized scheme to steal mail.*

Proposed Amendment: Section 2B1.1(b)(4) is amended to read as follows: "If undelivered United States mail was taken, increase the base offense level by 2 levels prior to the application of subsection (b)(1).".

Section 2B1.1 is amended by inserting the following additional subdivision:

"8. If the offense involved an organized scheme to steal undelivered United States mail, and the offense level determined above is less than level 14, increase to level 14.".

45. **Synopsis of Proposed Amendment:** *This amendment creates a new victim-related general adjustment to take into account the increased harm caused when there is more than one victim.*

Proposed Amendment: Chapter Three, Part A, is amended by inserting the following addition section:

"§3A1.4. Multiple Victims

If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense level by 2 levels for every 250 victims.

Number of Victims	Increase in Offense Level
2-99	2
100-349	4
350-649	6
650 or more	8.".

46. **Synopsis of Proposed Amendment:** *This amendment adds language to §3B1.3 (Abuse of a Position of Trust or Use of Special Skill) providing that this enhancement applies to all postal employees in respect to specified offenses. (Related amendment proposal: 23).*

Proposed Amendment: The Commentary to §3B1.3 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"This enhancement applies to all postal employees in respect to the following offenses: theft or obstruction of United States mail (18 U.S.C. §§ 1703, 1709); embezzlement of Postal Service funds (18 U.S.C. § 1711); and theft of Postal Service property (18 U.S.C. § 641).".

Proposed Amendments Published at the Request of the Legislative Subcommittee of the Federal Defenders

47. **Synopsis of Proposed Amendment:** *This amendment eliminates from §5K1.1 (Substantial Assistance to Authorities) the language requiring a government motion before the sentencing court can depart. (Related amendment proposals: 24 and 31).*

Proposed Amendment: The first sentence of §5K1.1 is amended to read as follows:

"The court may depart from the guidelines upon a finding that the defendant has substantially assisted in the investigation or prosecution of another person."

48. **Synopsis of Proposed Amendment:** *This amendment revises §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) to establish ceilings on the offense level for minor and minimal participants in jointly-undertaken activity. The amendment carries forward the policy of §3B1.2 to provide a greater reduction for minimal participants than for minor participants and the policy of this guideline to treat certain controlled substances more harshly than others. Thus, the amendment sets a ceiling for minor participants that is higher than the ceiling for minimal participants, and a ceiling for certain controlled substances (e.g., heroin) that is higher than the ceiling for other controlled substances (e.g., marihuana). (Related amendment proposals: 8, 9, 39, and 60).*

Proposed Amendment: Section 2D1.1(b) is amended by inserting the following additional subdivisions:

"(3) If the defendant was a minimal participant in the criminal activity upon which the offense of conviction is based, and the offense of conviction involved --

(A) marihuana, hashish, hashish oil, a Schedule I or II depressant, or a Schedule II, IV, or V substance, reduce by 4 levels, but in no event shall the offense level be greater than level 16; or

(B) any other controlled substance, reduce by 4 levels, but in no event shall the offense level be greater than level 20.

(4) If the defendant was a minor participant in the criminal activity upon which the offense of conviction is based, and the offense of conviction involved --

(A) marihuana, hashish, hashish oil, a Schedule I or II depressant, or a Schedule II, IV, or V substance, reduce by 2 levels, but in no event shall the offense level be greater than level 22; or

(B) any other controlled substance, reduce by 2 levels, but in no event shall the offense level be greater than level 26.".

49. **Synopsis of Proposed Amendment:** *This amendment clarifies that the weight used to determine the offense level under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) does not include (1) the weight of a substance that is involved in the manufacture of a controlled substance but that does not become a part of the final product (e.g., waste water that has been used to wash out impurities or to form a precipitate) and (2) the weight of a substance to which the drug is bonded or in which the drug is suspended (e.g., cocaine mixed with beeswax). (Related amendment proposal: 10).*

Proposed Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by adding at the end thereof the following:

" The term "mixture or substance" does not include portions of a mixture that are uningestible or unmarketable, or that have to be separated from the controlled substance before the controlled substance can be used. For example, the fiberglass in a cocaine-fiberglass bonded suitease would not be a part of the mixture, and the weight of the fiberglass would not be used in determining the offense level under this guideline. Similarly, the waste water used in the manufacture of a controlled substance would not be a part of the mixture, and the weight of the water would not be used in determining the offense level under this guideline.".

50. **Synopsis of Proposed Amendment:** *This amendment bases the offense levels in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) on the amount of actual LSD involved to eliminate the disparately high offense levels applicable to low-level traffickers in LSD. The dosage quantity of LSD is so small that at present nearly all of the weight used to determine a defendant's*

punishment comes from the weight of the carrier. Thus, a defendant who has enough pure LSD to produce 65,000 doses has an offense level that is the same as a defendant with blotter paper containing 500 doses of LSD.

Proposed Amendment: The asterisk footnote to subsection (c) of §2D1.1 is amended by adding after the first paragraph the following new paragraph:

"In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted.".

51. **Synopsis of Proposed Amendment:** *The legislative history behind the enactment of strong penalties for "cocaine base" indicates that Congress was targeting the rock form of cocaine that can be smoked and that is marketable in small quantities at a relatively low price. The street name for this substance is "crack". This amendment specifies that the term "cocaine base" in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) means "crack".*

Proposed Amendment: The asterisk footnote to subsection (c) of § 2D1.1 is amended by adding at the end thereof the following new paragraph:

"For the purposes of this guideline, the term "cocaine base" means the lumpy, rock-like form of cocaine base usually prepared by processing cocaine Hcl and sodium bicarbonate. 'Crack' is the street name for this form of cocaine base.".

52. **Synopsis of Proposed Amendment:** *This amendment requires the sentencing court, where the guidelines make a defendant eligible for a sentence of probation without a confinement condition, to sentence that defendant to probation without a confinement condition unless the court finds that imprisonment is necessary to serve the purposes of sentencing. This amendment also requires the sentencing court, where the guidelines make a defendant eligible for a sentence of probation with a confinement condition, to sentence the defendant to probation with the minimum confinement condition permitted unless the court finds that a greater confinement condition is necessary to serve the purposes of sentencing.*

Proposed Amendment: Section 5B1.1 is amended by adding the following new subsection:

"(c) A sentence of probation without a confinement condition shall be imposed if the applicable guideline range is in Zone A of the sentencing table unless the court finds, for reasons stated on the record, that a sentence of imprisonment is required to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). A sentence of probation with the minimum confinement condition permitted shall be imposed if the applicable guideline range is in Zone B of the sentencing table unless the court finds, for reasons stated on the record, that a greater confinement condition is required to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).".

53. **Synopsis of Proposed Amendment:** *This amendment simplifies the application of the related case rule in §4A1.2 (Definitions and Instructions for Computing Criminal History) and reduces disparate treatment of similarly-situated defendants produced merely by the happenstance of where prior cases were prosecuted. The amendment requires counting of prior sentences whenever the offenses from which the sentences resulted were separated by intervening arrest. Prior sentences for offenses not separated by an intervening arrest are considered one sentence, with the length of the term of imprisonment determined, in the case of concurrent sentences, by the longest term of imprisonment or, in the case of consecutive sentences, by the aggregate term of imprisonment.*

Proposed Amendment: Section 4A1.2(a)(2) is amended to read as follows:

"(A) Count prior sentences separately if the offenses from which those sentences resulted are

separated by an intervening arrest (i.e., the defendant is arrested for the first offense before defendant commits the second offense).

(B) Count as one sentence, for purposes of §4A1.1(a), (b), and (c), prior sentences that result from offenses not separated by an intervening arrest. Use the longest sentence of imprisonment if the sentences were concurrent, and the aggregate term of imprisonment if the sentences were consecutive.".

54. **Synopsis of Proposed Amendment:** *To avoid double counting, and to insure consistency with the provisions of §5G1.3, the term "instant offense" in subsection (a)(1) of §4A1.2 (Definitions and Instructions for Computing Criminal History) has to include "relevant conduct". One circuit, however, has held that the inquiry is not whether the prior sentence is for conduct that is "relevant conduct," but rather "whether the prior conduct constitutes a 'severable, distinct offense' from the offense of conviction," adding unnecessary complexity to the guideline.*

Proposed Amendment: Subsection (a)(1) of §4A1.2 is amended by adding "and its relevant conduct" after "the instant offense". Application Note 1 in the Commentary to §4A1.2 captioned "Application Notes" is amended in the first sentence of the first paragraph, by inserting "and its relevant conduct" after "the instant offense" the second time that term appears; and in the third sentence of the first paragraph, by inserting "including its relevant conduct," after "the instant offense" the first time that term appears, and by inserting "and its relevant conduct" after "the instant offense" the third time that term appears.

55. **Synopsis of Proposed Amendment:** *This amendment revises §4B1.1 (Career Offender) to require the court to impose upon a career offender a sentence that is at the top of the guideline range for Criminal History Category VI and the offense level otherwise determined.*

Proposed Amendment: Section 4B1.1 is amended by deleting the last two sentences and inserting in lieu thereof the following:

"A career offender's criminal history category shall be category VI. A career offender shall receive a sentence at the top of the applicable guideline range.".

56. **Synopsis of Proposed Amendment:** *Section 1B1.10 (Retroactivity of Amended Guideline Range) authorizes a court to reduce the sentence of a defendant serving a term of imprisonment when the guideline range applicable to the defendant has been reduced if the reduction was due to an amendment specified in subsection (d). This amendment adds to the list in subsection (d) the amendment to §3E1.1 that took effect November 1, 1992. The amendment also revises subsection (a) of the policy statement to authorize the court to reduce a sentence if the reduction is due to an amendment not on the list in subsection (d), if the court finds that a reduction would be consistent with the purposes of sentencing.*

Proposed Amendment: Section 1B1.10(d) is amended by inserting "459," after "433,". Section §1B1.10(a) is amended in the second sentence by adding at the end thereof "unless the court determines that the maximum of the guideline range has been reduced by at least six months and that a reduction in sentence would be consistent with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)".

Proposed Amendments and Issues for Comment Published at the Request of the Department of Justice

57. **Synopsis of Proposed Amendment:** *This amendment clarifies the Commission's intent with respect to whether §4A1.2 (Definitions and Instructions for Computing Criminal History) confers on defendants a right to attack prior convictions collaterally at sentencing, an issue on which the appellate courts have differed.*

Compare, e.g., United States v. Canales, 960 F.2d 1311, 1316 (5th Cir. 1992)(Section 4A1.2 commentary indicates Commission intended to grant sentencing courts discretion to entertain initial defendant challenges to prior convictions); United States v. Jacobetz, 955 F.2d 786, 805 (2d Cir. 1992)(similar); United States v. Cornog, 945 F.2d 1504, 1511 (11th Cir. 1991)(similar) with United States v. Hewitt, 942 F.2d 1270, 1276 (8th Cir. 1991)(commentary indicates defendants may only challenge use of prior convictions at sentencing by showing such conviction previously ruled invalid). Consistent with Braxton v. United States, 111 S.Ct. 1854 (1991), this amendment addresses this inter-circuit conflict in interpreting the commentary by stating more clearly that the Commission does not intend to enlarge a defendant's right to challenge the use of prior convictions for sentence enhancement purposes beyond any right otherwise recognized in law.

Proposed Amendment: The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting "Nonetheless," and inserting in lieu thereof:

"Whether a defendant at sentencing may collaterally attack a prior conviction or sentence is a procedural matter for court determination. The Commission does not intend this guideline or commentary to confer any right to attack collaterally at sentencing a prior conviction or sentence beyond any such right otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Notwithstanding the above,".

The Commentary to §4A1.2 captioned "Background" is amended by deleting the last paragraph as follows:

"The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction.".

58. **Synopsis of Amendment:** *This amendment to §2S1.3 harmonizes the treatment of violations involving various financial reports required by law. Currently, the base offense level under §2S1.3 for a failure to file a Currency Transaction Report (CTR) or an IRS Form 8300 is 5, absent structuring to evade reporting requirements, while the base offense level under §2S1.4 for a failure to file a Currency and Monetary Instrument Report (CMIR) is 9. A CTR must be filed by a financial institution engaging in a cash transaction greater than $10,000; a Form 8300 must be filed by a trade or business receiving more than $10,000 in cash; and a CMIR must be filed by a person who transports more than $10,000 in cash into or out of the United States. In each instance, these reporting requirements act as a check on large cash transactions that may be rooted in criminal conduct and permit monitoring of suspicious financial activities. This amendment reflects a judgment that these three types of reports are similar in purpose and that comparable violations involving them should be treated similarly. (Related amendment proposal: 20).*

Proposed Amendment: Section 2S1.3(a) is amended by inserting the following as new subsection (a)(2):

"(2) 9, for a willful failure to file; or";

and by renumbering current subsection (a)(2) as subsection (a)(3).

Section 2S1.3(b) is amended by inserting the following as new subsection (b)(2):

"(2) If the defendant knew or believed that the funds were intended to be used to promote criminal activity, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.";

by renumbering the current subsection (b)(2) as subsection (b)(3); and by inserting "or (a)(2)" immediately following "(a)(1)" in renumbered subsection (b)(3).

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by deleting the following:

"26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5322, 5324.";

and inserting in lieu thereof:

"26 U.S.C. §§ 7203 and 7206 (if a willful violation of 26 U.S.C. § 6050I or in connection with a return required under 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5322, 5324."

The Commentary to §2S1.3 captioned "Background" is amended in the second paragraph by inserting the following:

"A base offense level of 9 is provided for willful failure to file the required reports, and for the mere denial of reportable assets in response to routine questioning at a border crossing."

immediately following the first sentence.

Section 2S1.4, captioned "Failure to File Currency and Monetary Instrument Report," is deleted in its entirety.

The Commentary to § 2T1.3 captioned "Statutory Provision" is amended by deleting

"26 U.S.C. § 7206, except § 7206(2).";

and inserting in lieu thereof

"26 U.S.C. § 7206(1), (3), (4), and (5) (except in connection with a return required under 26 U.S.C. § 6050I)."

The Commentary to §2T1.4 captioned "Statutory Provision" is amended by inserting "except in connection with a return required under 26 U.S.C. § 6050I)" immediately following "26 U.S.C. § 7206(2).";

59. **Synopsis of Amendment:** *This amendment creates a new guideline applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. §1030). Violations of this statute are currently subject to the fraud guidelines at §2F1.1, which rely heavily on the dollar amount of loss caused to the victim. Computer offenses, however, commonly protect against harms that cannot be adequately quantified by examining dollar losses. Illegal access to consumer credit reports, for example, which may have little monetary value, nevertheless can represent a serious intrusion into privacy interests. Illegal intrusions in the computers which control telephone systems may disrupt normal telephone service and present hazards to emergency systems, neither of which are readily quantifiable. This amendment proposes a new Section 2F2.1, which provides sentencing guidelines particularly designed for this unique and rapidly developing area of the law.*

Proposed Amendment: Part F is amended by inserting the following section, numbered §2F2.1, and captioned "Computer Fraud and Abuse," immediately following Section 2F1.2:

"§2F2.1. Computer Fraud and Abuse

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) Reliability of data. If the defendant altered information, increase by 2 levels; if the defendant altered protected information, or public records filed or maintained under law or regulation, increase by 6 levels.

(2) Confidentiality of data. If the defendant obtained protected

information, increase by 2 levels; if the defendant disclosed protected information to any person, increase by 4 levels; if the defendant disclosed protected information to the public by means of a general distribution system, increase by 6 levels.

Provided that the cumulative adjustments from (1) and (2), shall not exceed 8.

(3) If the offense caused or was likely to cause

(A) interference with the administration of justice (civil or criminal) or harm to any person's health or safety, or

(B) interference with any facility (public or private) or communications network that serves the public health or safety,

increase by 6 levels.

(4) If the offense caused economic loss, increase the offense level according to the tables in §2F1.1 (Fraud and Deceit). In using those tables, include the following:

(A) Costs of system recovery, and

(B) Consequential losses from trafficking in passwords.

(5) If an offense was committed for the purpose of malicious destruction or damage, increase by 4 levels.

(c) Cross References

(1) If the offense is also covered by another offense guideline section, apply that offense guideline section if the resulting level is greater. Other guidelines that may cover the same conduct include, for example: for 18 U.S.C. § 1030(a)(1), §2M3.2 (Gathering National Defense Information); for 18 U.S.C. § 1030(a)(3), §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), §2B1.2 (Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property), and §2H3.1 (Interception of Communications or Eavesdropping); for 18 U.S.C. § 1030(a)(4), §2F1.1 (Fraud and Deceit), and §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft); for 18 U.S.C. § 1030(a)(5), §2H2.1 (Obstructing an Election or Registration), §2J1.2 (Obstruction of Justice), and §2B3.2 (Extortion); and for 18 U.S.C. § 1030(a)(6), §2F1.1 (Fraud and Deceit) and §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(1)-(a)(6)

Application Notes:

1. This guideline is necessary because computer offenses often harm intangible values, such as privacy rights or the unimpaired operation of networks, more than the kinds of property values which the general fraud table measures. See §2F1.1, Note 10. If the defendant was previously

convicted of similar misconduct that is not adequately reflected in the criminal history score, an upward departure may be warranted.

2. The harms expressed in paragraph (b)(1) pertain to the reliability and integrity of data: those in (b)(2) concern the confidentiality and privacy of data. Although some crimes will cause both harms, it is possible to cause either one alone. Clearly a defendant can obtain or distribute protected information without altering it. And by launching a virus, a defendant may alter or destroy data without ever obtaining it. For this reason, the harms are listed separately and are meant to be cumulative.

3. The terms "information," "records," and "data" are interchangeable.

4. The term "protected information" means private information, non-public government information, or proprietary commercial information.

5. The term "private information" means confidential information (including medical, financial, educational, employment, legal, and tax information) maintained under law, regulation, or other duty (whether held by public agencies or privately) regarding the history or status of any person, business, corporation, or other organization.

6. The term "non-public government information" means unclassified information which was maintained by any government agency, contractor or agent; which had not been released to the public; and which was related to military operations or readiness, foreign relations or intelligence, or law enforcement investigations or operations.

7. The term "proprietary commercial information" means non-public business information, including information which is sensitive, confidential, restricted, trade secret, or otherwise not meant for public distribution. If the proprietary information has an ascertainable value, apply paragraph (b) (4) to the economic loss rather than (b) (1) and (2), if the resulting offense level is greater.

8. Public records protected under paragraph (b) (1) must be filed or maintained under a law or regulation of the federal government, a state or territory, or any of their political subdivisions.

9. The term "altered" covers all changes to data, whether the defendant added, deleted, amended, or destroyed any or all of it.

10. A "general distribution system" includes electronic bulletin board and voice mail systems, newsletters and other publications, and any other form of group dissemination, by any means.

11. The term "malicious destruction or damage" includes injury to business and personal reputations.

12. Costs of system recovery. Include the costs accrued by the victim in identifying and tracking the defendant, ascertaining the damage, and restoring the system or data to its original condition. In computing these costs, include material and personnel costs, as well as losses incurred from interruptions of service. If several people obtained unauthorized access to any system during the same period, each defendant is responsible for the full amount of recovery or repair loss, minus any costs which are clearly attributable only to acts of other individuals.

13. Consequential losses from trafficking in passwords. A defendant who trafficked in passwords by using or maintaining a general distribution system is responsible for all economic losses that resulted from the use of the password after the date of his or her first general distribution, minus any specific amounts which are clearly attributable only to acts of other individuals. The term "passwords" includes any form of personalized access identification, such as user codes or names.

14. If the defendant's acts harmed public interests not adequately reflected in these guidelines, an upward departure may be warranted. Examples include interference with common carriers, utilities, and institutions (such as educational, governmental, or financial institutions), whenever the defendant's conduct has affected or was likely to affect public service or confidence."

60. **Synopsis of Amendment:** *This amendment to §3B1.2 is intended to adopt a rule, in light of the current scope of "relevant conduct" under §1B1.3, against mitigating role adjustments for a defendant who has been held responsible under the definition of relevant conduct only for the quantity of controlled substances in which he or she actually trafficked. Such a rule recognizes that a role reduction is not appropriate when the measure of the defendant's involvement in the offense is not increased by the conduct of others. That is, he or she cannot be considered a minor or minimal participant as to his or her own conduct. (Related amendment proposals: 8, 39, and 48).*

Proposed Amendment: Section 2B1.2 is amended by adding the following subsection:

"(c) No mitigating role adjustment under this section shall be applied to a defendant whose offense level is determined in part by reference to the drug quantity table in §2D1.1 or the chemical quantity table in §2D1.11 where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession.

The Commentary to Section 3B1.2 captioned "Application Notes" is amended by adding the following Notes:

(5) Section 3B1.2(c) applies when a defendant is convicted of an offense for which the drug quantity table in §2D1.1 or the chemical quantity table in §2D1.11 is applicable and the relevant conduct consists exclusively of the amount of drugs or chemicals in the defendant's actual possession. Because the actual possession of drugs or chemicals is essential to drug or chemical trafficking, no mitigating adjustment is available to the defendant when the relevant conduct of the drug or chemical amounts consists of only the drugs or chemicals in the defendant's actual possession. This provision prevents a mitigating adjustment for a courier or mule when the only drug or chemical amounts which can be proved are the amounts in the actual possession of the defendant, regardless of the number of other participants.

(6) Section 3B1.2(c) should not result in a mitigating adjustment for other participants simply because actual possession of drugs or chemicals is limited to one person. For example, if two persons agree to carry drugs or chemicals between cities; but, at the time of arrest, only one of the persons is in actual possession of drugs or chemicals, the defendant in constructive possession is not entitled to a mitigating adjustment. Similarly, when one person provides the money to purchase drugs or chemicals intended for later distribution, that person is not entitled to a mitigating role adjustment simply because the drugs or chemicals are discovered in the actual possession of another person. In these examples, each defendant is equally culpable and neither deserves a mitigating adjustment.

(7) When the relevant conduct for the drug or chemical amounts consists of drug or chemical amounts greater than the amount in the defendant's actual possession, a mitigating role is possible. In no event, however, may a defendant receive a mitigating adjustment which lowers the offense level below that applicable for the amount of drugs or chemicals in the defendant's actual possession."

61. **Synopsis of amendment:** *This amendment to §4B1.2 revises the definition of "crime of violence" for the purpose of the career offender guidelines to include all burglaries, and not just burglaries of a dwelling. In including all burglaries, this amendment conforms the definition of "crime of violence" for the purpose of*

the career offender guidelines to the definition required by statute for the armed career criminal guideline. See 18 U.S.C. § 924(e)(2)(B); Section 2B1.4, Application Note 1. This amendment also revises Application Note 2 to make it clear that "crime of violence" includes the possession of a firearm by a felon, conduct which is a criminal offense because Congress has determined that such conduct presents a risk of violence.

Proposed amendment: Section 4B1.2 is amended in subsection (1)(ii) by deleting the words "of a dwelling" immediately following the word "burglary."

The Commentary to Section 4B1.2 is amended in Application Note 2 by deleting the words "does not include" in the first sentence of the second paragraph, and inserting in lieu thereof the word "includes."

62. **Issue for Comment:** The Commission requests comment on whether §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), §2B4.1 (Bribery in Procurement of Bank Loans or Other Commercial Bribery), and §2F1.1 (Fraud and Deceit) should be amended to provide a 4 level enhancement in the base offense level for all offenses which affect a financial institution. An enhanced offense level would reflect the dramatic increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of ten major bank fraud and embezzlement offenses. The Commission also requests comment on whether the guidelines should provide an exception to such an enhancement for minor thefts by low level employees. (Related amendment proposal: 26).

63. **Issue for Comment:** The Commission requests comments on whether the caps on base offense levels for distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants should be removed or raised so that violations involving very large quantities of these drugs will result in greater sentences. The current provisions limit the base offense level to that applicable to 20 kilograms of these substances, regardless of how much greater the actual quantities may be.

Additionally, The Commission requests comment on whether the guideline ranges for trafficking in anabolic steroids, serious drugs of abuse which now receive relative low penalties, should be increased to make them more comparable to those for other Schedule III substances. In particular, the Commission also requests comment on whether the definition of a "unit" of anabolic steroid in the last paragraph of §2D1.1 should be changed from "a 10 cc vial of injectable steroid or fifty tablets," to "a one cc vial of injectable steroid or five tablets." The Commission also requests comment on whether fewer than five tablets should be equivalent to a one cc vial of injectable steroid.

64. **Issue for Comment:** The Commission requests comment on whether in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) —

(1) the base offense level for offenses involving National Firearms Act firearms (e.g. machineguns, short-barreled firearms, silencers) should be increased from the current level 18 to level 22 (level 24 for destructive devices);

(2) the offense levels for offenses involving semiautomatic firearms should be increased from the current level 12 to level 22 (the level proposed for machineguns and most other National Firearms Act firearms).

(3) the base offense level for firearms violations by prohibited persons (e.g., felons or fugitives) should be increased by 4 levels;

(4) the minimum offense level for possession or use of a firearm in connection with another felony offense should be increased from level 18 to level 22;

(5) the cumulative offense level restriction (cap) of level 29 should be eliminated;

(6) the base offense level for distribution of a firearm to a prohibited person (e.g. a felon or fugitive) should be increased from the current level 12 to level 16: and

(7) the adjustment for offenses involving multiple firearms should increase more rapidly.

65. **Issue for Comment:** The Commission requests comment on whether the Commission should amend §2F1.1 to include the risk of loss as a factor in determining the applicable guideline range for fraud and related offenses when the amount at risk is greater than the amount of the actual or intended loss. If so, should the risk of loss increase the applicable guideline range to the same extent as actual or intended loss? Should the risk of loss be limited to that which is reasonably foreseeable (e.g. the amount of the loan in a fraudulent loan application)? (Related amendment proposals 6, 7, and 57).

66. **Issue for Comment:** The Commission requests comment on whether, in light of the threat to the safety of our communities posed by gang-related crime, the guidelines should provide for a 4-level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang. In this regard, the Commission also requests comment on whether a "criminal gang" should be defined as "a group, club, organization, or association of five or more persons whose member engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses."

CUA

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March 8, 1993

The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20002-8002

RE: Proposed Guideline Amendments
for Public Comment - 1993 Cycle

Dear Chairman Wilkins:

On behalf of the Practitioner's Advisory Group (hereinafter called "PAG"), I am writing to you concerning the upcoming amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comments.

TO AMEND OR NOT TO AMEND THE GUIDELINES

A significant debate has begun both within and outside of the Sentencing Commission concerning the propriety of continuously amending the Guidelines. 28 U.S.C. §991(b)(1)(C) requires that "The Commission develop means of measuring the degree to which the sentencing, penal and corrections practices are effective in meeting the purpose of sentencing ... " 28 U.S.C §994 (o) requires the commission to "periodically review and revise.... the guidelines promulgated pursuant to this section." This same statute requires an annual review of the operation of the Guidelines with suggested changes.

It appears that Congress contemplated continued fine tuning of the guidelines sentencing process with at least an annual review of that process culminating in amendments if appropriate. It appears that Congress did not intend that amendments be required annually but such amendments are clearly permitted.

The arguments put forth in support of the practice of amendments is that at least during the initial period of guidelines application there is a need for adjustments in the process which completely altered how sentencing is accomplished in Federal court. The guidelines

are still relatively young; indeed, one of the attributes of a guidelines system is the ability to change practices based on experience gained from the application of the guidelines, while at the same time continuing to promote uniformity in sentencing.

Those who have begun to voice concerns about the continuing amendment process have criticized a perceived IRS-type code mentality with constant changes resulting in confusion, misapplication and the reappearance of disparate sentencing practices based upon institutional disparity resulting from continual Commission and congressional action. The critics point out that for sentencing to be an effective crime deterrent punishment must be certain and consistent, and a system which continually changes cannot be either.

The PAG finds merit in both of the above arguments. Continuous substantive changes in guidelines would result in institutional disparity with one's sentence being potentially dependent upon substantive changes taking place in the amendment cycle immediately preceding one's crime. On the other hand Congress clearly intended for the guidelines sentencing process to be dynamic and not stagnant with changes occurring as dictated by experience, especially in the initial application period in response to actual guidelines utilization.

The Commission's five-year practice of restrained change appears to appropriately balance these competing interests. In fact, the PAG has recommended less restraint and more substantive changes during past cycles than we are advocating during this amendment cycle. It would be unfortunate if the argument against any change prevailed in this amendment cycle in that many of the current proposals represent the culmination of area review or working groups final reports which have taken either one year or several cycles to complete. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in enabling legislation.

SPECIFIC AMENDMENT PROPOSALS

The PAG has broken down its comments into three areas: (1) Proposed Drug Amendments (numbered paragraph 1); (2) Proposed Tax Amendments (numbered paragraph 2); and (3) other proposed amendments which are covered sequentially (numbered paragraphs 3-22).

COMPREHENSIVE PROPOSAL FOR DRUG OFFENDERS

1. Proposed Amendments 8-12 - Drug Trafficking and Role in the Offense - The PAG prefers the Comprehensive Proposal for Drug Offenders that forms the basis of our Proposed Amendment number 39. Our original proposed amendment number 39 was published as pages 57-63 of the "reader friendly" proposed guideline

amendments. Attached to this letter is our "new" proposed amendment number 39, which contains changes as a result of further reflection and as a result of a consensus reached at the Practitioners' Advisory Group meeting held on February 22, 1993. The PAG rational for our proposed amendments in the drug area is as follows:

One of the most troublesome aspects of the sentencing guidelines revolves around controlled substances. Judges, defense lawyers, probation officers and even prosecutors have focused criticism on four major areas. First, it is argued that by centering drug sentences on the quantity of controlled substances, other aspects of drug crimes such as violence, organization, profits and obstruction of justice are inappropriately diminished as factors which influence sentencing, especially at the higher ranges where these aggravating characteristics are most likely to occur. Second, critics have argued that the establishment of drug crime mandatory minimum sentences in the Crime Control Acts of 1986 and 1988 inappropriately influenced the sentencing levels set by the Sentencing Commission for all drug crimes, even those not subject to the congressional mandate. Third, it has been argued that the Commission's failure to more fully define the mitigating factors of minor and minimal participants has resulted in a disparate application of this critical aspect of drug sentencing. Finally, there has been vocal protest that the drug guidelines treat less significant participants in concerted drug activity too harshly. Critics argue that usually overkill results when a lower level defendant, because of the application of relevant conduct principles, is credited with most or all of the substances distributed by all the participants in jointly undertaken drug activities.

The PAG believes that many of these criticisms have merit. Because the critical interplay between role in the offense adjustments, specific offense characteristics and drug quantity significantly influences the final sentence in drug crimes, the PAG believes that a comprehensive integrated proposal which addresses all of these critical aspects is the approach most likely to correct what currently is an imperfect system for sentencing drug offenders.

The PAG has closely examined various proposals and has synthesized those changes which would have the most impact on current inequities. The central guiding principles of the changes proposed are the underlying justifications for sentencing codified in 18 U.S.C., §3553(a)(2). Only changes which offer significant increases in deterrence, protection and just punishment should be adopted by the Commission now that the guidelines have in large part been successfully tested in the Courts. The PAG believes that the changes proposed are necessary when considered in light of these guideposts of deterrence, protection and just punishment.

SPECIFIC OFFENSE CHARACTERISTICS

The increasing possession, display and use of firearms in drug crimes remains a societal problem which demands increased protection. The PAG believes that an incremental rise of 2 and 4 levels for increasingly serious conduct involving firearms can provide increased protection and deterrence which is needed and warranted when firearms are used to facilitate drug offenses. In fact, 15% of all drug offenders sentenced in 1991 in Federal Court possessed firearms. In contrast, only 3% were career offenders. The current two-level increase for possession, or the threat of a 924(c) prosecution for use or carrying, does not adequately address the use of weapons in drug crimes. Our new incremental proposal (a 2 level increase for possession of a dangerous weapon and a 4 level increase for use of a dangerous weapon) forms an important link to the proposal which follows to emphasize aggravating and mitigating factors in drug crime sentencing.

As quantity somewhat decreases in importance in drug crimes, role in offense increases in importance. The PAG does not believe any further distinction should be drawn between organizations which employ more than 5 individuals. It may take only a few pilots to smuggle large amounts of cocaine, while it may take 225 off-loaders to smuggle a large amount of marijuana, so that at the upper levels, numbers of participants become less relevant. The result is that persons who qualify for level 38 quantity, who are organizers, but who fully accept responsibility, would not receive the maximum penalty unless they obstructed justice or otherwise engaged in other aggravating conduct. Again, quantity is adequately considered under the PAG proposal, but leadership and obstruction are also re-established as critically important factors, as they should be, in a system grounded on protection and deterrence.

DRUG TABLE

When the Commission originally structured §2Dl.l, the drug quantity tables ended at level 36, but the table was later amended to level 42. The Commission also keyed the offense levels for drug amounts which corresponded to the 10-year (1 kilogram of Heroin, 5 kilograms of Cocaine, 1,000 kilograms of Marijuana, etc.) and 5 year (100 grams of Heroin, 500 grams of Cocaine, 100 kilograms of Marijuana, etc.) mandatory minimums at guideline ranges so that the mandatory minimums were encompassed by the low point in the corresponding range rather than the high point in that range. The result of these two fundamental decisions have made drug quantity the linchpin in federal sentencing for controlled substances violators. The PAG recognizes that mandatory minimums must play a role in designing sentences for all drug defendants and that because mandatory minimums focus on drug quantity, the guidelines must reflect such a focus. The PAG thus rejects proposals which inappropriately diminish these aspects. However, both the selection of a low point keyed to the mandatory minimum and the increase of the tables up to the

maximum level of 42 have severely overemphasized quantity in achieving the final sentence for the drug offender. The PAG believes that this overemphasis on quantity provides less rather than more protection to citizens of the United States.

The guidelines system is significantly built on the underlying theoretical justification of deterrence. Potential defendants are discouraged from committing crimes, and persons who committed lesser offenses are deterred from aggravating their conduct because increasing penalties are prescribed.

The Commission has identified certain specific aggravating factors which increase a defendant's sentence so as to deter persons from engaging in such acts.

The entire guidelines system presupposes that the more aggravated a crime becomes the higher the sentence should be so that the system is designed to punish in a graduated manner with incremental increases as conduct becomes more serious so that society is protected from the serious offender.

Unfortunately, the current guidelines contain no incentive for persons distributing larger quantities of substances to desist from engaging in aggravating conduct, because at the upper end of the guidelines quantity determines the maximum sentence without regard to aggravating factors. There is no differentiation between the large quantity dealer who uses a firearm (15%), who obstructs justice (5%), who uses special skills (1%), or who realizes substantial gain, from the large scale dealer who does not engage in such conduct. In essence, for the level 42 dealer, the guidelines speak words of encouragement to obstruct justice because the dealer's sentence is only determined by quantity, and if the dealer successfully obstructs justice, the dealer may receive no sentence at all.

The larger scale, non-violent drug dealer who uses no weapon, pays no hush money, bribes no official, and uses no special skill should not receive the same sentence, simply because of quantity, as the dealer who does engage in such aggravating conduct.

By adjusting the guidelines downward so as to further punish those upper end drug defendants who committed egregious acts in furtherance of their drug enterprises, the Commission can reestablish deterrence as an element of sentencing for these offenders without violating the intent of Congress which established mandatory minimums. The PAG proposal would establish level 38 as the upper end for quantity. The proposed departure is eliminated for truly unusually large quantities so as to emphasize aggravating factors which are also expanded under our proposal. The PAG proposal also would key the mandatory minimum to the upper end of the guideline range so that persons below that range would be sufficiently deterred from larger scale distributions and to provide more emphasis on aggravating factors. These proposals preserve quantity as an important factor

but contain the additional benefits of protecting society by discouraging offenders from aggravating their conduct. Only 3% of all drug offenders are career offenders, yet Congress and the Commission have focused attention on this group. The PAG proposal impacts upon 15% to 20% of offenders while preserving congressional mandates.

Finally, a base offense level cap of level 32 for serious drug offenses and a base offense level cap of 26 for offenses involving all other controlled substances for those defendants who qualify for a mitigating role adjustment, protects against overly harsh sentencing for defendants who are only peripherally involved in the offense.

ROLE IN OFFENSE

Mitigating Role

The PAG believes its proposal to clarify by example those who qualify for mitigating treatment in concerted activity will significantly end disparity in this area.

Deleting the language concerning the lack of knowledge of the scope of the activity, which is contained in the subgroup proposal, was accomplished because such knowledge and lack thereof can play a significant role in the newly redesigned rules of application for relevant conduct and should therefore play no part in determining mitigating role. If the defendant is responsible for all jointly undertaken activities, but played a minor or minimal role, he qualifies for a reduction. If he was only aware of a small part of the offense conduct, but was not a minor participant in the conduct he was aware of, his overall offense level may be diminished but not because of a downward role adjustment.

Also, the PAG sees no reason to treat "mules" any differently than sellers, financiers, or owners and includes transporters so that they are treated in the same manner as these persons.

Because of the increases proposed for firearms possession as specific offense characteristics, the PAG believes a disqualification for firearms possession is no longer appropriate. Using the "Pinkerton" theory to saddle a significantly minimal participant with the principal organizer's weapon is a concept which should be rejected because it blurs the organizational lines between such participants. Minimal offenders who actual possess weapons will receive incremental increases as a deterrent to weapon possession. Persons who induce others to possess or use weapons also are included in this specific offense characteristic.

The PAG believes that the changes proposed enhance the underlying purposes of sentencing, diminish disparate treatment and ameliorate the sentences for minor and

minimal participants in drug distribution activity while continuing to provide significantly just punishment for these serious federal offenders. The PAG believes that the changes proposed substantially contribute to forming a more perfect guidelines sentencing structure. The PAG believes that if this package of amendments is adopted as a whole, the concerns articulated by the Judicial Advisory Group resulting from a simple reduction in base offense levels are in large part eliminated because of the re-emphasis on aggravating factors created by the balance of the provisions in this package of amendments.

PROPOSALS RELATING TO TAX OFFENSES

This report comments on the proposed amendments to the federal sentencing guidelines affecting prosecutions for tax offenses. The amendments published by the Sentencing Commission for public comment would delete the enhancements for "more than minimal planning" and "sophisticated means" used in connection with fraud-related and tax offenses in Sections 2B, 2F and 2T, and substitute increases in the loss tables, consolidate the guidelines for tax offenses in Section 2T, and create a uniform definition of "tax loss." The proposals published at the request of the Internal Revenue Service would restructure the guidelines applicable to most tax felonies to provide for a fixed base offense level and an incremental enhancement for tax losses. All reference to the tax loss table in §2T4.1 is deleted. The IRS also seeks to modify the Chapter 3 grouping rules to increase offense levels for certain grouped offenses, proposes a new offense guideline for the non-violent aspects the omnibus criminal provision in 26 U.S.C. §7212(a), and puts forth proposed enhancements to the narcotics and money laundering offenses that would apply when there is evidence of unreported income.

SUMMARY

The PAG opposes the Commission's proposal to delete the enhancements for "more than minimal planning" and "sophisticated means" used to calculate the sentencing range for fraud-related and tax offenses and use an increase in the loss tables as a surrogate. The PAG favors the proposal to consolidate the tax guidelines and to simplify the definition of "tax loss" by using a uniform standard that allows the actual loss of revenue to the government to rebut an artificial construction of a defendant's tax liability. The PAG opposes new commentary in Section 2T that would cumulate the tax loss on individual and corporate returns involved in a single course of conduct on the grounds it constitutes invidious double counting.

The PAG takes no position on the IRS proposals that generally increase the sanctions for tax crimes and increase the offense levels determined when two or more counts are grouped. The PAG prefers the tax loss definition suggested in the amendments for public comment over the IRS formulation which relies more heavily on

artificial constructs of a defendant's tax liability than on the actual tax loss suffered by the government. The PAG expresses no opinion on the IRS' proposed guideline for violations of 26 U.S.C. §7212(a). Finally, the PAG opposes the IRS proposal to add an enhancement to the narcotics and money laundering guidelines for unrelated and uncharged tax offenses.

Proposed Amendment number 5 - Fraud, Theft, Tax -

1. Summary of Guideline

The guidelines for larceny, fraud-related offenses, and tax crimes include an enhancement when the defendant's conduct involves more planning or sophistication in committing the offense than would otherwise be typical or required to support a conviction. In the larceny and fraud-related guidelines the enhancement applies to "more than minimal planning."[1] In the tax context, the enhancement applies when a defendant uses "sophisticated means" to prevent the offense from being detected.

The General Application Principles in Chapter One instruct that the "more than minimal planning" enhancement for larceny and fraud offenses is appropriate in three situations: (1) where the offense involves "more planning than is typical for commission of the offense in a simple form," (2) where "significant affirmative steps were taken to conceal the offense," and (3) "in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. §1B1.1, comment. n.1(f). See also United States v. Rust, 976 F.2d 55 (1st Cir. 1992).

In the guidelines for tax offenses, the enhancement is to be used "if sophisticated means were used to impede discovery of the nature or extent of the offense." See, e.g., U.S.S.G. §2T1.1(b)(2). Like the enhancement for "more than minimal planning" the standard is subjective and only generally defined. See United States v. Brinson, No. 90 CR 273-1, 1991 WL 235925 at *4 (N.D. Ill. Oct. 30, 1991) ("whether 'sophisticated means' were employed (§2T1.1(b)(2)") requires a subjective determination similar to that in §2F1.1(b)(2) (citation omitted)). It "includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." U.S.S.G. §2T1.1, comment. (n.6). By way of illustration, the guidelines suggest that the enhancement is applicable "where the defendant used offshore bank accounts, or transactions through corporate shells." Id.

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[1]Under the fraud and deceit guideline the enhancement is worded in the disjunctive and applies either to "more than minimal planning" or "a scheme to defraud more than one victim." U.S.S.G. §2F1.1(b)(2).

Amendment No. 5 would delete entirely the specific offense characteristic for "more than minimal planning" employed in the guidelines for larceny, fraud and insider trading[2] and the correlative specific offense characteristic for "sophisticated means" employed in the guidelines for tax offenses.[3] As a surrogate, changes would be made to the applicable loss tables resulting in a two level increase over the November 1, 1992, guidelines for loss amounts greater than $40,000. Additionally, this amendment would modify the loss tables in Sections 2B, 2F and 2T to use a more constant rate of increase in the loss increments and to increase the offense levels for cases that involve exceptionally high losses. The proposed changes to the loss tables are set forth below:

Larceny, §2B1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	$100 or less	$600 or less
Add 1	More than $100	More than $600
Add 2	More than $1,000	More than $1,000
Add 3	More than $2,000	More than $1,700
Add 4	More than $5,000	More than $3,000
Add 5	More than $10,000	More than $5,000
Add 6	More than $20,000	More than $8,000
Add 7	More than $40,000	More than $13,500
Add 8	More than $70,000	More than $23,500
Add 9	More than $120,000	More than $40,000
Add 10	More than $200,000	More than $70,000
Add 11	More than $350,000	More than $120,000
Add 12	More than $500,000	More than $200,000
Add 13	More than $800,000	More than $325,000
Add 14	More than $1,500,000	More than $550,000
Add 15	More than $2,500,000	More than $950,000
Add 16	More than $5,000,000	More than $1,500,000
Add 17	More than $10,000,000	More than $2,500,000
Add 18	More than $20,000,000	More than $4,500,000
Add 19	More than $40,000,000	More than $8,000,000

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[2] See U.S.S.G. §§ 2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B6.1, 2F1.1, and 2F1.2.

[3] See U.S.S.G. §§ 2T1.1(b)(2), 2T1.2(b)(2), 2T1.3(b)(2); 2T1.3(b)(2), 2T1.4(b)(2), and 2T1.3(b)(1).

Add 20	More than $80,000,000	More than $13,500,000
Add 21		More than $23,500,000
Add 22		More than $40,000,000
Add 23		More than $70,000,000
Add 24		More than $120,000,000

Fraud and Deceit, §2F1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	$2,000 or less	$1,700 or less
Add 1	More than $2,000	More than $1,700
Add 2	More than $5,000	More than $3,000
Add 3	More than $10,000	More than $5,000
Add 4	More than $20,000	More than $8,000
Add 5	More than $40,000	More than $13,500
Add 6	More than $70,000	More than $23,500
Add 7	More than $120,000	More than $40,000
Add 8	More than $200,000	More than $70,000
Add 9	More than $350,000	More than $120,000
Add 10	More than $500,000	More than $200,000
Add 11	More than $800,000	More than $325,000
Add 12	More than $1,500,000	More than $550,000
Add 13	More than $2,500,000	More than $950,000
Add 14	More than $5,000,000	More than $1,500,000
Add 15	More than $10,000,000	More than $2,500,000
Add 16	More than $20,000,000	More than $4,500,000
Add 17	More than $40,000,000	More than $8,000,000
Add 18	More than $80,000,000	More than $13,500,000
Add 19		More than $23,500,000
Add 20		More than $40,000,000
Add 21		More than $70,000,000
Add 22		More than $120,000,000

Tax Table, §2T4.1

Offense Level	Tax Loss (Current)	Tax Loss (Proposed)
6	$2,000 or less	$1,700 or less
7	More than $2,000	More than $1,700
8	More than $5,000	More than $3,000
9	More than $10,000	More than $5,000
10	More than $20,000	More than $8,000
11	More than $40,000	More than $13,500
12	More than $70,000	More than $23,500
13	More than $120,000	More than $40,000
14	More than $200,000	More than $70,000
15	More than $350,000	More than $120,000
16	More than $500,000	More than $200,000
17	More than $800,000	More than $325,000
18	More than $1,500,000	More than $550,000
19	More than $2,500,000	More than $950,000
20	More than $5,000,000	More than $1,500,000
21	More than $10,000,000	More than $2,500,000
22	More than $20,000,000	More than $4,500,000
23	More than $40,000,000	More than $8,000,000
24	More than $80,000,000	More than $13,500,000
25		More than $23,500,000
26		More than $40,000,000
27		More than $70,000,000
28		More than $120,000,000

We oppose the portion of this proposed amendment that would delete the enhancement for "more than minimal planning" and "sophisticated means" and substitute a two level increase in the loss tables. This proposal is philosophically, practically, and legally flawed. Deleting the enhancement is inconsistent with the underpinnings of the guidelines because it removes a valid sentencing variable from consideration and increases the opportunities for sentencing disparity. Moreover, phasing out the planning and sophistication enhancements undercuts the effort to increase offense levels where extremely high losses are involved. As a practical matter, the amendment erroneously presumes that a measure of the quantitative monetary loss suffered by the victim or society is a rational surrogate for the qualitative acts of the defendant when he commits the offense. In the context of the case law, the proposed amendment appears to

eliminate a double counting problem that to date has gone unrecognized in the published opinions. The problem that appears in the application of this enhancement is its overuse where there are "repeated acts" otherwise already taken into consideration by the loss tables, and the tendency to confuse the number of acts with thorough planning.

The proposed amendment is philosophically inconsistent with the Sentencing Commission's goals of increasing deterrence, reducing sentencing disparity, and distinguishing between offenses committed on the spur of the moment and those that require forethought and preparation. See, e.g., U.S.S.G. §1B1.1, comment. (n.1(f)). If there is validity to the proposition that "[t]he extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm," the enhancement for more than minimal planning and sophistication should be retained so that the courts have an articulated basis in the guidelines for distinguishing such offenses at sentencing. See U.S.S.G. §2F1.1, comment. (backg'd.) (emphasis added). The current guidelines contain a framework that the courts can use to assess the defendant's conduct. When a defendant's criminal activity involves only minimal planning, no enhancement is called for under the guidelines. When a defendant's preparations for carrying out the offense are "more than" minimal or the defendant utilizes sophisticated means to avoid detection, the guidelines provide for a two level increase in the offense level. Finally, when a defendant takes "extraordinary" measures to conceive, execute and conceal the offense of conviction and the relevant conduct, an upward departure is warranted. Eliminating the sentencing variable for planning and sophistication risks losing sight of the goal of deterring sophisticated criminals by punishing them more severely than those who commit the typical offense and offers a greater opportunity for sentencing disparity. See U.S.S.G. §2T1.1, comment. (backg'd.); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("a major purpose of providing individualized, conduct-related adjustments is to ensure different sentences for criminal conduct of different severity.... [D]ouble counting is inconsistent with this goal").

Monetary loss is not a rational surrogate for forethought, planning and sophistication. There is no rational basis for assuming that it necessarily takes more planning to steal $10 by false pretenses than it takes to steal $10,000. See United States v. Meek, 972 F.2d 1346 (9th Cir. 1992), pet. for cert. filed, _____ U.S.L.W. _____ (U.S. Nov. 16, 1992) (text in Westlaw). Similarly, when a defendant submits a false travel voucher to the state for reimbursement, there is no qualitative difference between a $1,700 alteration and a $17,000 alteration. See United States v. Rust, 976 F.2d 55, 56 (1st Cir. 1992). Yet, under the proposed amendment, there would be no enhancement for the former and a four level increase for the latter. There can be large loss cases where no planning, no repetitive acts, and no significant acts to conceal the conduct were involved. Cf. U.S.S.G. §2F1.1, comment. (n.10) ("[i]n a few instances the loss determined

[from the loss table] may overstate the seriousness of the offense"). By like token, a well-planned and concealed fraud may produce little or no monetary loss.

Reviewing the proposed amendment in light of the published case law suggests that this proposal seeks to eradicate a non-existent double counting problem. The guidelines acknowledge that certain offenses, even in their "simple form," require more than minimal planning. For example, where the offense "substantially jeopardize[s] the safety and soundness of a financial institution," courts are instructed there shall be a rebuttable presumption that the offense involved "more than minimal planning." U.S.S.G. §2F1.1, comment. (n.18) (emphasis added). In the tax guidelines, the commentary observes that "tax evasion always involves some planning." U.S.S.G. 2T1.1, comment. (backg'd.). See United States v. Beauchamp, _____ F.2d _____, 1993 WL 30804 at *4 (1st Cir. Feb. 16, 1993) ("[c]rimes of fraud and deceit by their very nature may, and often do, compel, quite predictably, later efforts at a cover-up"); United States v. Lennick, 917 F.2d 974, 979 (7th Cir. 1990) (applying enhancement "to factual scenarios involving clear examples of ... complex criminal activity"); United States v. Fox, 889 F.2d 357, 361 (1st Cir. 1989); ("[we] cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning"); United States v. Kaufman, 800 F. Supp. 648, 655 (N.D. Ind. 1922) (refusing to find that a scheme involving a second set of corporate books to facilitate tax evasion "was more complex or demonstrated greater intricacy ... than a routine tax evasion case"). Cf. United States v. Sanchez, 914 F.2d 206, 207 (10th Cir. 1990) (upholding enhancement because the offense involved "several calculated falsehoods"). Compare United States v. Maciaga, 965 F.2d at 408 ("a simple step to hide [the] crime ... does not amount to 'more than minimal planning'").

Accordingly, the base offense level for larceny, fraud-related and tax offenses already incorporates the "simple form" planning in the conception, execution or concealment phases. The enhancement is appropriate only when this basic degree of planning has been exceeded. See United States v. Georgiadis, 933 F.2d 1219, 1226 (3d Cir. 1991) ("§2B1.1(b)(1) calibrates punishment to the magnitude of victim injury and criminal gains ... 'more than minimal planning' considers the deliberative aspects of a defendant's conduct and criminal scheme"). Since the base offense level contemplates the ordinary planning necessary to commit the offense, and the enhancement applies only to incremental additional planning, there is no double counting. See United States v. Wilson, 955 F.2d 547, 550 (8th Cir. 1992); Cf. United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991). Finally, this proposal is unnecessary. Prison sentences for those whose crimes result in greater losses can effectively be lengthened by adopting that portion of the amendment that modifies the loss tables and leaving the "more than minimal planning" and "sophisticated means" enhancements in place to be independently evaluated.

Rather than eliminating the enhancement, the PAG suggests that it be clarified so that it focuses on the kinds of planning and sophistication that cannot be quantitatively measured. The "repeated acts" prong can be deleted without disturbing the purpose of the enhancement because where there are repeated acts of fraud by definition there will be increases in the losses and concomitant increases in the offense level.

Proposed Amendment number 21 - Tax -

Summary of Guidelines

In the sentencing guidelines as amended on November 1, 1992, there are 12 tax guidelines in Section 2T. Nine relate to income tax offenses, including tax evasion, tax perjury, willful failure to file or supply information, aiding and assisting in the preparation of a false return, and conspiracy to defraud the United States.[4] U.S.S.G. §§2T1.1- 2T1.9. Two deal with non-payment of taxes and regulatory offenses in connection with alcohol and tobacco tax offenses. U.S.S.G. §§2T2.1 - 2T2.2. One relates to evading import duties, smuggling and receiving or trafficking in smuggled property. U.S.S.G. §2T3.1.

There is substantial overlap in the five guidelines related to tax evasion, willful failure to file, tax perjury, aiding and abetting tax fraud, and filing false returns (U.S.S.G. §2T1.1 - 2T1.5). All but the guideline for filing a false return use the tax loss table in §2T4.1 to determine the base offense level and enhance the level if the offense involves more than $10,000 of income from criminal activities or "sophisticated means" were used to impede discovery of the nature or extent of the offense.[5] However, each guideline utilizes a different definition of "tax loss," which is the key determinant of the sentence.

This amendment would consolidate the guidelines for tax evasion, willful failure to file, tax perjury, and false tax returns into one guideline. The base offense level would be the greater of the level taken from the tax table in §2T4.1, or six, in instances where

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[4]Although the conspiracy statute does not appear in the Internal Revenue Code, tax-related indictments often include a charge of defrauding the United States by impeding or obstructing the lawful governmental functions of the IRS in ascertaining and collecting taxes in violation of 18 U.S.C. §371. See United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

[5]The PAG's comments on the proposed amendments affecting the specific offense characteristic related to "sophisticated means" appear in the discussion of Amendment No. 5, supra.

there is no tax loss. There would be two specific offense characteristics each calling for a two level enhancement. One would apply "if the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity" (the same as in the current guidelines). A second would apply "if sophisticated means were used to impede discovery of the existence or extent of the offense."

This proposal would adopt a uniform definition of "tax loss" based on a series of rebuttable presumptions tailored to the nature of the offense or the actual amount that was the object of the evasion, or that the taxpayer owed and did not pay. The amendment also contains two new Application Notes related to the "tax loss" definition. As proposed, the commentary would provide that "the rebuttable presumption is to be used unless the government or defense provides sufficient information for a more accurate assessment of the actual tax loss." The proposed commentary would also provide that "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together."

Finally, this Amendment contains minor clarifications of the specific offense characteristics related to professional return preparers convicted of aiding and abetting tax fraud in §2T1.4, and conduct to encourage others to commit tax crimes or participate in Klein conspiracies encompassed in §2T1.9. The amendment also contains proposals to conform the grouping guidelines in §3D1.2(d) to the proposed consolidation in Section 2T.

The PAG favors simplifying the guidelines for tax offenses. The proposed consolidation does not alter the structure of the tax guidelines or their substantive operation. The only change that would result would be a one level increase in the base offense level applicable to convictions for willful failure to file a return currently set at one level less than the amount derived from the tax table or five where there is no tax loss.

The PAG also favors adoption of a more workable definition of the "tax loss" to be used in calculating the base offense level. The current framework -- with four different definitions and numerous variables -- has led to inconsistent interpretations. Some courts look to the actual tax loss; some use other formulations. Compare United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991) with United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992).

The PAG favors the adoption of a uniform definition of "tax loss." A single tax loss definition that utilizes presumptions rebuttable by evidence of the actual tax loss to the government would eliminate the confusion and allow sentences to be determined based on the actual tax loss as computed in accordance with the Internal Revenue Code.

The only aspect of this amendment that the PAG opposes is the new Application Note that provides "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together." This provision constitutes blatant double counting when applied to a single course of criminal conduct and flies in the face of the changes to the "tax loss" definition in which the actual loss of revenue to the government is preferred over an artificial construction of the loss based on rebuttable presumptions.

Assume the following factual scenario: The defendant skims money from his employer and alters the corporate books and records to conceal the amount diverted. He fails to report the diverted income on his individual income tax return and causes the corporation to file a false return that understates its corporate revenue. He pleads guilty to one count of income tax violation in connection with his individual tax return. There is only one source of income, i.e., the $1 paid to the corporation is the same $1 diverted by the defendant.

The proposed application note presumes that each $1 diverted by the defendant constitutes $2 taxable income: $1 of income on which the corporation is liable for taxes and $1 of taxable income to the defendant. A "tax loss" based on this formulation double counts one course of conduct to arrive at an artificial "tax loss" incurred by the government.

The Supreme Court requires a clear expression of legislative intent before sentence enhancement provisions can be applied cumulatively. See Busic v. United States, 446 U.S. 398, 403-404 (1980); Simpson v. United States, 435 U.S. 6, 12-13 (1978). Coupled with the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," Id. at 14 (citation omitted), in the context of determining a sentencing factor cumulative punishment for the same conduct would be impermissible absent specific recognition and authority from the Commission and the Congress. The rule, to date, has been that one course of conduct should not be cumulatively punished under the guidelines. See United States v. Lamere, 980 F.2d 506, 517 (8th Cir. 1992); (an enhancement based on "conduct that [is] coterminous with the conduct for which [the defendant is] convicted" constitutes impermissible double counting); United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992) ("the Commission did not intend for the same conduct to be punished cumulatively"); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("the Sentencing Commission did not intend for multiple Guidelines sections to be construed so as to impose cumulative punishment for the same conduct"). There is no basis for departing from this rule to calculate a tax loss especially where the result would overstate the actual loss of revenue to the government.

PROPOSED TAX AMENDMENTS PUBLISHED AT THE REQUEST OF THE IRS

Proposed Amendment number 41 - Tax - (I.R.S. Proposal)

Summary of Guideline

The IRS proposes to rewrite §2T1 in its entirety. The guidelines in Sections 2T1.1 through 2T1.9 would be replaced in toto. The commentary would also be revised. The IRS would increase base offense levels, adopt a uniform definition of "tax loss," and create a new offense guideline for certain non-violent violations of 26 U.S.C. §7212(a). The IRS would abandon the current structure of the tax guidelines which uses tax losses and the tax table in §2T4.1 to determine a base offense level where there is a tax loss, and a fixed level where there is no loss. In its place, the IRS proposes to fix the base offense level for felonies at nine for failure to file and ten for tax evasion, tax perjury and Klein conspiracies. A new specific offense characteristic would enhance the base offense level where the "tax loss" from the defendant's conduct exceeded $10,000. Using the same incremental increases employed in the November 1, 1992, tax table (not the increments appearing in proposed Amendment No. 5), the enhancement ranges from a low of one additional level for a tax loss of more than $10,000 but less than $20,001 to a high of 10 additional levels when the tax loss exceeds $800,000. The IRS would define "tax loss" for the purposes of this guideline as "the amount of loss that was the object of the evasion or fraud." A simple set of facts will illustrate the differences between the IRS proposal and the combined impact of proposed Amendments No. 5 and 21. Assume that a defendant is convicted of one count of tax evasion. Although the indictment alleges that the defendant attempted to evade $1.0 million of tax, at the sentencing hearing, the defendant establishes that the actual tax loss to the government was only $600,000. All of the income at issue is from legal sources. The defendant did not use sophisticated means to impede discovery of his offense, and no other guideline adjustments are applicable. Under the IRS proposal, the tax loss would be the entire $1 million, and the base offense level would be 20 (10 for tax evasion plus an enhancement of 10 for a tax loss greater than $800,000). Under proposed Amendment No. 21, the tax loss would be $600,000. Using the tax loss table appearing in proposed Amendment No. 5, a tax loss of $600,000 would yield a base offense level of 18.

The commentary proposed by the IRS provides for a rebuttable presumption that the tax loss would be determined by applying the defendant's applicable tax rate to the total amount that the defendant attempted to evade, the amount of omitted income, the improper deduction or tax credit, and so forth. Furthermore, while these calculations could be overcome by "credible evidence" produced by the defendant that the tax loss "was different," the defendant would be prohibited from showing "that the actual tax loss was less than the amount calculated ... by asserting that the intended loss was less than

that which would have resulted had the scheme succeeded." The IRS also proposes a new offense guideline to be used for violations of 26 U.S.C. §7212(a), pertaining to "corrupt endeavors to obstruct or impede the due administration of the internal revenue laws" excluding those involving forcible threats or interference which would continue to be addressed by the assault guidelines in §2A2.2 and §2A2.3, as suggested in the Commission's statutory appendix.

While the PAG expresses no opinion on whether there should be an increase in the base offense levels for tax crimes, it prefers the "tax loss" formulation appearing in proposed Amendment No. 21 over the IRS proposal. The IRS proposal ignores the actual impact of the defendant's conduct and would put artificial constraints on a defendant's ability to rebut tax loss calculations made by the government. The PAG expresses no opinion on whether it is necessary or desirable to adopt a new offense guideline for violations of 26 U.S.C. §7212(a).

Proposed Amendment number 42 - Grouping Rules - (I.R.S. Proposal)

Summary of Guideline

Guideline §3D1.2 sets forth the criteria for grouping multiple counts involving "substantially the same harm". The specific section addressed by proposed Amendment No. 42 provides that two (or more) counts shall be grouped when one embodies conduct that is treated as a specific offense characteristic in (or other adjustment to) the guideline applicable to another count. U.S.S.G. §3D1.2(c). The rules for determining the offense level applicable to counts grouped in accordance with §3D1.2(c) appear in §3D1.3(a). When counts are grouped pursuant to §3D1.2(c), the offense level applicable to the group is the offense level for the most serious single count within the group. Guideline §2D1.1 applies to certain narcotics crimes and violation of the continuing criminal enterprise ("CCE") statutes. Guideline §2S1.1 applies to certain money laundering activities.

This Amendment has two options. In Option One, the IRS proposes an amendment to §3D1.3 to address the situation where the count that gives rise to a grouping requirement pursuant to §3D1.2(c) has a lower base offense level than the other count(s) with which it is grouped. In this circumstance, the IRS proposes that two levels be added to the applicable base offense level determined in accordance with §3D1.3(a). Option Two proposes the addition of a special offense characteristic to the narcotics and CCE guideline in §2D1.1(b) and the §2S1.1(b) money laundering guidelines to be employed "if the defendant failed to report income exceeding $10,000 in any year." The proposed amendment to the narcotics and CCE guideline specifically refers to unreported income from the "unlawful manufacturing, importing, exporting,

trafficking, or possession of drugs." The proposed amendment to the money laundering guideline has no such limitation.

The PAG believes that both Options One and Two are superfluous. Under §3D1.3(a), the ultimate offense level applicable to counts grouped pursuant to §3D1.2(c) will be that offense level which is the highest for any single count within the group. Any specific offense characteristic that constitutes a criminal activity will be considered as relevant conduct pursuant to §1B1.3(a). Similarly, the proposed enhancement for the tax offenses specified in Option Two will either be addressed as relevant conduct, or in the sentence calculations for unrelated charged offenses. Unrelated, uncharged conduct is not and should not be a basis for sentence enhancements.

Proposed Amendment number 43 - Grouping Rules (I.R.S. Proposal)

Summary of Guideline

Section 3D1.4 provides the framework for determining the offense level when there is more than one group of counts. The bench mark is the group with the highest offense level. Each additional group is assigned a unit value (that corresponds to an enhancement) depending on its seriousness (measured by its calculated offense level) relative to the bench mark. Under §3D1.4(b) any group that is five to eight levels less serious than the bench mark is assigned one-half Unit. Groups that are nine or more levels less serious than the bench mark are disregarded. U.S.S.G. §3D1.4(c).

The IRS proposal would delete §§3D1.4(b) and 3D1.4(c), and assign one-half Unit value to any group where the offense level is five or more units less serious than the bench mark. The PAG expresses no opinion on this proposed amendment.

3. Proposed Amendment number 1 - Relevant Conduct - The PAG favors Proposed Amendment numbered 1 (PAG #35) which would amend Section, 1 B1.3 by adding a new subsection (c) which would prohibit a sentencing court from including in the offense level alleged conduct of which the defendant has been acquitted after either a court trial or a jury trial. This amendment makes good sense. Although caselaw indicates that double jeopardy provisions do not prohibit a sentencing court from considering conduct of which the defendant has been acquitted, no defendant should be forced to run the gauntlet twice. The present sentencing mechanism allows the government to include counts in an indictment on which the evidence is marginal or weak, take the case to trial on all counts, lose some of the counts at trial because of insufficiency of the evidence on a "beyond a reasonable doubt" standard and then relitigate the matter at sentencing

(where hearsay evidence is allowed) and prevail on a preponderance of the evidence standard.

The government should be content with one bite at the apple. With the relaxed rules of evidence that apply at a sentencing hearing, the defendant should only be held accountable for those counts to which he has either pled guilty or been convicted of in a contested trial.

4. Proposed Amendment number 3 - Juvenile Delinquency Act - The PAG is in support of a new policy statement which would address the applicability of the guidelines to juveniles. We believe this policy statement is necessary in light of the recent Supreme Court decision in United States vs. R. L. C., 112 S. Ct. 1329 (1992).

5. Proposed Amendment number 6 - Fraud - This proposed amendment would add language to § 2F1.1, Application Note 10(a), authorizing upward departure where a fraud "caused substantial non-monetary harm." At present, Application Note 10(a) authorizes upward departure only where "the primary objective of the fraud was non-monetary", but fails explicitly to cover those situations where fraudulent activity results in unintended by nonetheless substantial non-monetary harm.

a. Mens Rea

Upward departure may be appropriate in those rare instances where monetary loss is an inadequate measure of the seriousness of an offense. Certainly, there such offenses including, for example, schemes "to deprive another of the intangible right of honest services" (18 U.S.C. §§ 1341 and 1346). However, ***unintended*** harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to ***reasonably foreseeable*** harm.[9] The Commission's legitimate concern might be addressed by an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.[10]

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[9] This sort of limitation obviously has occurred to the Commission in other contexts, as shown by the language of the existing guideline provisions discussed infra, and by one of the questions posed with respect to Amendment #65, also discussed infra.

[10] Perhaps it would be appropriate for the Commission to establish a single standard of culpability for all of the offense characteristics and adjustments based on the harm caused by the offense. It doesn't make much sense for a defendant to be held responsible under

b. Cumulativeness

This proposed amendment, if adopted, should note the existence of specific offense characteristics, adjustments and commentary which already take non-monetary harm into account, and therefore would make departure inappropriate in many cases of non-monetary harm. For example:

> § 2F1.1(b)(4) provides for an increase of two levels, to a minimum of level 13, for offenses which involve the conscious or reckless risk of serious bodily injury;[11]
>
> § 3A1.1 provides for a 2 level upward adjustment where the defendant knew or should have known that a victim was unusually vulnerable.

In addition, the commentary to this proposed amendment clearly is cumulative of existing provisions. The single example given in the proposed amendment is that departure:

> might be warranted in the case of a fraudulent blood bank operation that failed to preserve the donors' blood. Such an offense might cause substantial harm to numerous victims that is not adequately taken into account by the total monetary loss, which might be comparatively small.

Contrary to the language of the proposed amendment, departure would be inappropriate in that case because the harm caused by this sort of offense was adequately taken into account in the formulation of specific offense characteristics. The sentencing court likely would impose a 2 level increase because the offense involved more than one victim (§2F1.1(b)(2)(B)).[12] In addition, the court would impose an additional 2 level increase, to a minimum of 13, based on the obvious risk of serious bodily injury (§ 2F1.1(b)(4)).

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§ 3A1.1 when he "knew or should have known" that a victim was particularly vulnerable, while being held responsible under § 2F1.1 only for the "conscious or reckless" risk of serious bodily harm.

[11] Although §2F1.1(b)(4) is phrased in terms of "risk", such risk is inherent in every case where harm actually occurs. In any event, language relating to actual harm could easily be incorporated into particular provisions, where necessary.

[12] Although Application Note 3 is phrased in terms of "obtain[ing] something of value from more than one person", the offense characteristic probably would apply equally in cases of non-monetary fraud.